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Petition for Certiorari filed September 30, 1969

Certiorari Granted February 27, 1970

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. 675

JOSEPH CHARLES USNER,

Petitioner,

versus

LUCKENBACH OVERSEAS CORPORATION, ET AL,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

Petition for Certiorari filed September 30, 1969
Certiorari Granted February 27, 1970

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION
JOSEPH CHARLES USNER

versus

LUCKENBACH STEAMSHIP COMPANY, INC.
STATE MARINE LINES, INC.
and UNION BARGE LINES CORP.
Civil Action Number 15531
Division B
(Filed: April 27, 1965)

COMPLAINT

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION:

The complaint of Joseph Charles Usner, a person of the full age of majority and a resident and citizen of the State of Louisiana, complains as follows:

1.

That the jurisdiction of this Honorable Court arises under Section 1333 of Title 28 of the United States Code concerning itself with Admiralty and Maritime Jurisdiction.

2.

Defendant, Luckenbach Steamship Company, Inc., is a foreign corporation organized and existing under the laws of the State of Delaware and has not appointed an agent for service of process in the State of Louisiana; defendant, States Marine Lines, Inc., is a foreign corporation with principal offices at 90 Braud Street, New York, New York, and is doing business in the State of Louisiana but has not filed the necessary papers with the Secretary of State of the State of Louisiana, appointing an agent for service of process within this state; defendant, Union Barge Lines Corporation, is a foreign corporation with principal offices at the Dravo Building, 5th and Liberty Street, Pittsburgh, Pennsylvania, and is doing business in the State of Louisiana but has not filed the necessary papers with the Secretary of State, State of Louisiana, appointing an agent for service of process within this state.

3.

On or about April 28, 1964, complainant was employed by T. Smith & Son, Inc., Stevedores, aboard the vessel U.B.L. NO. 417, a barge owned and operated by defendant, Union Barge Lines Corporation, which vessel was tied to the vessel, Edgar Luckenbach, a ship owned by defendant, Luckenbach Steamship Company, Inc., and chartered by defendant, States Marine Lines, Inc., and petitioner was injured because of the unseaworthiness of the barge U.B.L. No. 417 and the ship Edgar Luckenbach, and because of the negligence of the charterer, States Marine Lines Corporation, the ship owner, Luckenbach Steamship Company, Inc. and the employer Stevedoring company.

4.

As a result, petitioner was injured in the sum of $150,000.00, plus an additional sum of $5,000.00 for medical expenses.

WHEREFORE, complainant prays for judgment against the defendants, *in solido*, in the sum of $150,000.00 damages, plus $5,000.00 medical expenses, and all costs of these proceedings. Petitioner further prays for a trial by jury.

by Attorneys:

H. ALVA BRUMFIELD
JACK E. YELVERTON
509 St. Louis Street
Baton Rouge, Louisiana
By: /s/ Jack E. Yelverton

ANSWER

(Number and Title Omitted) (Filed: June 10, 1965)

TO THE HONORABLES, THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION:

The answer of States Marine Lines, Inc., defendant, to the complaint of Joseph Charles Usner, with respect represents:

I

Defendant avers that the allegations of Article 1 of the complaint are conclusions of law which do not require answers; if, however, answers are required, said allegations are denied.

II

Insofar as the allegations of Article 2 of the complaint refer or relate to defendant, States Marine Lines, Inc., said allegations are denied except that defendant admits that it is a foreign corporation with offices at 90 Broad Street, New York, New York.

III

For lack of sufficient knowledge or information to justify belief, defendant denies the allegations contained in Article 3 of the complaint except that defendant admits that on or about April 28, 1964, the SS EDGAR F. LUCKENBACH was under charter to the defendant, States Marine Lines, Inc., and that defendant specifically

denies that the plaintiff was injured because of alleged unseaworthiness and/or negligence for which defendant is responsible or liable.

IV

The allegations of Article 4 of the complaint are denied.

V

Further answering the complaint, and as a separate and distinct defense, defendant avers that any injuries sustained by the plaintiff, which are denied, resulted from his own fault, carelessness, or inattention to duty, for which defendant is not liable, or from the fault, negligence, or breach of contractual obligations of others for whom the defendant is not responsible or liable, and were not due to or in any way contributed to or caused by the fault or negligence of the defendant or anyone for whose fault or negligence defendant is responsible or liable.

VI

Defendant further avers in the alternative that if the injuries which the plaintiff may have sustained, and which are denied, were caused or contributed to by its fault or negligence and/or by any unseaworthiness for which defendant is responsible or liable, all of which is denied, then, in that event, defendant avers that said injuries and their resulting consequences were contributed to by the fault and negligence and inattention to duty of the plaintiff, and your defendant specifically pleads contributory negligence on the part of the plaintiff in mitigation of his recovery, if any.

VII

Defendant avers that it has been and is continuing its investigation of the allegations set forth in the complaint, and defendant specifically reserves the right to file supplemental and amended answers and to assert claims through appropriate pleadings against one or more third parties and/or parties to this action, depending upon the facts as they may develop.

WHEREFORE, defendant prays that after due proceedings had there be judgment in its favor, dismissing the complaint with costs. Defendant further prays for all general and equitable relief.

TERRIBERRY, RAULT,
CARROLL, YANCEY &
FARRELL

By: /s/ M. D. Yager
Attorneys for Defendant
State Marine Lines, Inc.
825 Whitney Building
New Orleans, Louisiana 70130

ANSWER

(Number and Title Omitted) (Filed: June 17, 1965)

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION:

NOW COMES Union Barge Line Corporation, who for answer to the plaintiff's complaint, avers:

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

For answer to the specific allegations of the plaintiff's complaint, Union Barge Lines Corporation avers:

1.

The allegations of paragraph 1 do not require an answer.

2.

The allegations of paragraph 2 are denied except that it is admitted that Union Barge Lines Corporation is a foreign corporation with its principal offices in Pittsburgh, Pennsylvania.

3.

The allegations of paragraph 3 are denied for lack of sufficient information to justify a belief.

4.

The allegations of paragraph 4 are denied for lack of sufficient information to justify a belief.

Third Defense

Any injuries sustained by the plaintiff as alleged were caused by his own negligence and in the alternative by his contributory negligence, which bars his recovery herein or mitigates his damages.

WHEREFORE, Union Barge Lines Corporation prays that this answer be deemed good and sufficient and the plaintiff's suit dismissed.

And for all general and equitable relief.

ADAMS AND REESE

By: /s/ George V. Baus
847 National Bank of Commerce Building, New Orleans, Louisiana
Attorneys for defendant, Union Barge Lines Corporation

MOTION AND ORDER DROPPING AND ADDING PARTIES DEFENDANT

(Number and Title Omitted) (Filed: July 13, 1965)

Now comes Luckenbach Overseas Corporation, through its undersigned counsel, and upon suggesting to the Court that, at all times pertinent hereto, it was, and still is,

the owner of the SS EDGAR F. LUCKENBACH, which vessel is referred to and alleged to be unseaworthy in the complaint of Joseph Charles Usner filed herein, and, accordingly, Luckenbach Overseas Corporation is a proper party defendant in the above-entitled cause; and

Upon further suggesting to the Court that it is in order for Luckenbach Steamship Company, Inc. to be dropped as party defendant in this action, with its name stricken from the summons and complaint and all other pleadings, and that the action continue without Luckenbach Steamship Company, Inc. to the same effect as if it had never been joined; and

Upon further suggesting to the Court that it is in order for Luckenbach Overseas Corporation to be added as a party defendant and the title to this action amended to list Luckenbach Overseas Corporation as a defendant;

IT IS ORDERED that Luckenbach Steamship Company, Inc. be and the same is hereby dropped as party defendant in this action, with its name stricken from the summons and complaint and all other pleadings, and that the action continue without Luckenbach Steamship Company, Inc. to the same effect as if it had never been joined; and

IT IS FURTHER ORDERED that Luckenbach Overseas Corporation be and the same is hereby added as a party defendant and the title to this action amended to list Luckenbach Overseas Corporation as a defendant herein.

New Orleans, Louisiana, July 15, 1965.

/s/ Robert A. Ainsworth, Jr.
UNITED STATES DISTRICT
JUDGE

TERRIBERRY, RAULT, CARROLL,
YANCEY & FARRELL

By: /s/ M. D. Yager
Attorneys for Luckenbach
Overseas Corporation

No Objection:

H. ALVA BRUMFIELD
JACK E. YELVERTON

By: /s/ Jack E. Yelverton
Attorneys for Joseph Charles
Usner

ANSWER

(Number and Title Omitted) (Filed: August 17, 1965)

TO THE HONORABLES, THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION:

The answer of Luckenbach Overseas Corporation, defendant, to the complaint of Joseph Charles Usner, with respect represents:

I.

Defendant avers that the allegations of Article 1 of the complaint are conclusions of law which do not require answers; if, however, answers are required, said allegations are denied.

II.

Insofar as the allegations of Article 2 of the complaint may refer or relate to defendant, Luckenbach Overseas Corporation, said allegations are denied except that defendant admits that it is a foreign corporation and has not appointed an agent for service of process in the State of Louisiana.

III.

For lack of sufficient knowledge or information to justify belief, defendant denies the allegations contained in Article 3 of the complaint except that defendant admits that on or about April 28, 1964, defendant owned the SS EDGAR F. LUCKENBACH, and that defendant specifically denies that the plaintiff was injured because of alleged unseaworthiness and/or negligence for which defendant is responsible or liable.

IV.

The allegations of Article 4 of the complaint are denied.

V.

Further answering the complaint, and as a separate and distinct defense, defendant avers that any injuries sustained by the plaintiff, which are denied, resulted from his own fault, carelessness, or inattention to duty, for which defendant is not liable, or from the fault, negligence, or breach of contractual obligations of others for whom the defendant is not responsible or liable, and were not due to or in any way contributed to or caused by the fault or negligence of the defendant or anyone for whose fault or negligence defendant is responsible or liable.

VI.

Defendant further avers in the alternative that if the injuries which the plaintiff may have sustained, and which are denied, were caused or contributed to by its fault or negligence and/or by any unseaworthiness for which defendant is responsible or liable, all of which is denied, then, in that event, defendant avers that said injuries and their resulting consequences were contributed to by the fault and negligence and inattention to duty of the plaintiff, and your defendant specifically pleads contributory negligence on the part of the plaintiff in mitigation of his recovery, if any.

VII.

Defendant avers that is has been and is continuing its investigation of the allegations set forth in the complaint, and defendant specifically reserves the right to file supplemental and amended answers and to assert claims through appropriate pleadings against one or more third parties and/or parties to this action, depending upon the facts as they may develop.

WHEREFORE, defendant prays that after due proceedings had there be judgment in its favor, dismissing the complaint with costs. Defendant further prays for all general and equitable relief.

TERRIBERRY, RAULT,
CARROLL, YANCEY
& FARRELL

By: /s/ M. D. Yager
Attorneys for Defendant
Luckenbach Overseas Corporation
825 Whitney Building
New Orleans, Louisiana 70130

MOTION AND ORDER DROPPING AND ADDING PARTIES DEFENDANT

(Number and Title Omitted) (Filed: December 14, 1965)

Now comes Isthmian Lines, Inc., through its undersigned counsel, and upon suggesting to the Court that, at all times pertinent hereto, it was the charterer of the SS EDGAR F. LUCKENBACH, which vessel is referred to and alleged to be unseaworthy in the complaint of Joseph Charles Usner filed herein, and, accordingly, Isthmian Lines, Inc. is a proper party defendant in the above-entitled cause; and

Upon further suggesting to the Court that States Marine Lines, Inc., named defendant herein as charterer of the said vessel, was not in fact the charterer, and, accordingly, that it is in order for States Marine Lines, Inc. to be dropped as party defendant in this action, with its name stricken from the summons, complaint, answer, and all other pleadings, and that the action continue without States Marine Lines, Inc. to the same effect as if it had never been joined; and

Upon further suggesting to the Court that it is in order for Isthmian Lines, Inc. to be added as a party defendant, with its name substituted for that of States Marine Lines, Inc. in the summons, complaint, answer and all other pleadings, and that the action continue with the same force and effect as if Isthmian Lines, Inc. had been proceeded against in the place and stead of States Marine Lines, Inc.;

IT IS ORDERED that States Marine Lines, Inc. be and the same is hereby dropped as party defendant in this action, with its name stricken from the summons,

complaint, answer and all other pleadings, and that the action continue without States Marine Lines, Inc. to the same effect as if it had never been joined; and

IT IS FURTHER ORDERED that Isthmian Lines, Inc. be and the same is hereby added as a party defendant, with its name substituted for that of State Marine Lines, Inc. on the summons, complaint, answer and all other pleadings, and that the action continue with the same force and effect as if Isthmian Lines, Inc. had been proceeded against in the place and stead of States Marine Lines, Inc.

New Orleans, Louisiana, December 15, 1965.

/s/ Hebert Christenberry
UNITED STATES DISTRICT JUDGE

TERRIBERRY, RAULT, CARROLL,
YANCEY & FARRELL

By: /s/ M. D. Yager
Attorneys for Isthmian Lines, Inc. and
for States Marine Lines, Inc.
Whitney Bk. Bldg., New Orleans, La., 525-0641

NO OBJECTION:

H. ALVA BRUMFIELD
JACK E. YELVERTON

By: /s/ Jack E. Yelverton
Attorneys for Joseph Charles Usner
509 St. Louis St., Baton Rouge, La., 343-0618

MOTION FOR SUMMARY JUDGMENT

(Number and Title Omitted) (Filed: July 19, 1967)

Now comes Luckenbach Overseas Corporation and Isthmian Lines, Inc., defendants, and upon suggesting to the Court that on the basis of the transcript of the deposition of plaintiff Joseph Charles Usner, the affidavit of Wilbert Antoine, and the summary of material facts, attached hereto and made a part hereof, there are no genuine issues as to any material facts which will render defendants liable herein;

Wherefore, defendants move for summary judgment in their favor, dismissing the complaint as against them, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

TERRIBERRY, RAULT,
CARROLL, YANCEY
& FARRELL

By: /s/ M. D. Yager
Attorneys for Luckenbach Overseas Corporation and Isthmian Lines, Inc.
2141 International Trade Mart Bldg.
2 Canal Street
New Orleans, Louisiana 70130

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

CIVIL ACTION
No. 15,531
DIVISION "B"

JOSEPH CHARLES USNER

versus

LUCKENBACK STEAMSHIP COMPANY, INC., STATE MARINE LINES, INC., and UNION BARGE LINES CORP.

AFFIDAVIT OF WILBERT ANTOINE ATTACHED TO MOTION OF LUCKENBACH OVERSEAS CORP. and ISTHMIAN LINES, INC., FOR SUMMARY JUDGMENT

(Filed: July 19, 1967)

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, a Notary Public in and for the Parish of Orleans, State of Louisiana, duly commissioned and qualified, personally came and appeared:

WILBERT ANTOINE

who being by me first duly sworn, did depose and say:

He is 44 years old and has worked as a longshoreman in the Port of New Orleans since 1941; he works basically as a hold man but that he had worked at least 150 days as a break-out winch operator and at least 50 days as a regular winch operator prior to April 28, 1964; that he operated the break-out winch aboard the SS EDGAR LUCKENBACK on April 28, 1964; that the break-out winch was being used to assist in the discharge of cargo from a barge moored alongside that ship.

He experienced no difficulty whatsoever with the ship's winch at any time that day and that the winch and all the ship's equipment functioned properly throughout the break-out operations.

(s) Wilbert Antoine
Wilbert Antoine

Sworn to and subscribed
before me, this 24th day
of August, 1965.
(s) Albert H. Hanemann, Jr.
Notary Public

SUMMARY OF MATERIAL FACTS PURSUANT TO LOCAL RULES OF COURT, ATTACHED TO MOTION OF LUCKENBACH OVERSEAS CORP. and ISTHMIAN LINES, INC., FOR SUMMARY JUDGMENT

(Filed: July 19, 1967)

Now come defendants Luckenbach Overseas Corporation and Isthmian Lines, Inc., and in support of their motion for summary judgment, and for that purpose

only, submit the following statement of material facts as to which defendants contend there is no genuine issue to be tried, said statement being submitted pursuant to the Local Rules of Court:

On April 28, 1964, the SS EDGAR F. LUCKENBACH, owned by defendant Luckenbach Overseas Corporation and under charter to defendant Isthmian Lines, Inc., lay moored to a dock in the Port of New Orleans, Louisiana, loading a cargo of steel products from one or more barges alongside. The loading operations were being conducted by stevedore T. Smith & Son, Inc., and among those stevedore employees participating in the work was longshoreman Joseph Charles Isner, the plaintiff herein.

During the forenoon and up until the accident allegedly occurred at about 2:30 p.m., April 28, plaintiff worked aboard a barge which was made fast alongside the ship, approximately abreast of hatch No. 3. The after offshore boom and winch at the ship's No. 2 hatch were operated by and under the direction of other stevedore employees to "break out" the cargo of lengths of steel on the barge, following which the cargo gear at hatch No. 3 was used to bring the steel on board. On the barge plaintiff worked with the "break out" gear, receiving and handling the "break out" hook and slings which were used to raise individual drafts of cargo temporarily to facilitate their being readied for loading onto the vessel.

Up until the time of the accident, the cargo activities, and particularly the use and operation of the "break out" gear, proceeded in the customary and normal manner, and there were no complaints about the working conditions which prevailed. The stowage of the steel cargo aboard the barge was proper, and the "break out" hook

had been lowered to and handled by the plaintiff without difficulty.

On the occasion of the accident, however, the "break out" gear was not lowered to within the plaintiff's reach as it had been before, but the hook and slings were stopped while still several feet above him, in which position he could not reach them. The stevedore derricksman (or signal man) on the ship directing the "break out" winch operator told the plaintiff that the gear would be lowered and placed in his, the plaintiff's, hands; but suddenly and unexpectedly, the hook and slings were lowered rapidly and over a greater distance than had been anticipated, striking the plaintiff and carrying him off balance, as a result of which he fell.

All of the EDGAR F. LUCKENBACH'S gear and equipment, including the "break out" winch and gear, functioned properly at all times. The ship's personnel aboard the EDGAR F. LUCKENBACH at the time of the accident did not participate in or supervise the cargo operations and did not use, manage or direct the "break out" winch and gear.

TERRIBERRY, RAULT, CARROLL, YANCEY & FARRELL

BY: (s) M. D. Yager
Attorneys for Luckenbach Overseas Corporation and Isthmian Lines, Inc.
2141 International Trade Mart Bldg.
2 Canal Street
New Orleans, Louisiana 70130

DEPOSITION OF JOSEPH C. USNER

(Number and Title Omitted) (Filed: July 19, 1967)

Deposition of JOSEPH C. USNER taken before Leonard J. Bossier, Jr., Notary Public in and for the Parish of Orleans, State of Louisiana, in the offices of Adams & Reese, 847 National Bank of Commerce Building, New Orleans, Louisiana, on the 11th day of August, 1965.

APPEARANCES:

LAW OFFICES OF:
H. ALVA BRUMFIELD
(BY: JACK E. YELVERTON, ESQ.)
For the Plaintiff

ADAMS & REESE
(BY: GEORGE V. BAUS, ESQ.)
For the Defendant, Union
Barge Line Corporation

TERRIBERRY, RAULT, CARROLL,
YANCEY & FARRELL
(By: M. D. YAGER, ESQ.)
For the Defendant, States
Marine Lines, Inc., and
Luckenbach Overseas Corp.

LEMLE & KELLEHER
(BY: THOMAS W. THORNE, JR., ESQ.)
For T. Smith & Son,

REPORTED BY:
Leonard J. Bossier, Jr.,
Official Court Reporter.

STIPULATION

It is stipulated and agreed by and between all parties that the deposition of JOSEPH C. USNER is hereby being taken pursuant to the Federal Rules of Civil Procedure, for purposes of discovery. All formalities including those of signing, sealing, certification and filing are waived; all objections except those as to the form of the questions are reserved until the time of the trial of the cause.

JOSEPH C. USNER, 21 Ren Pass Avenue, Harahan, Louisiana, a witness named in the above stipulation, being first duly sworn in the cause, testified on his oath as follows:

BY MR. BAUS:

Q State your name, please.

A Joseph C. Usner.

Q Mr. Usner, where do you presently reside?

A 21 Ren Pass, Harahan.

Q And how old are you, sir?

A Forty-five.

Q And are you married?

A Yes.

Q And you live with your wife?

A That's right.

Q And do you have any children?

A Three.

Q Do you own your own home?

A Well, it's not paid for.

Q It's a mortgage against it?

A It's a mortgage.

Q What is your present occupation, Mr. Usner?

A Longshoreman.

Q On April 28, 1964 you were also a longshoreman?

A Yes, sir.

Q How long have you been a longshoreman?

A I think going on eighteen years.

Q And for what stevedore are you presently employed or by what stevedore?

A T. Smith & Son.

Q How long have you been employed by T. Smith & Son?

A The whole time.

Q Eighteen years?

A Eighteen years.

Q Have you been employed by any other stevedores?

A Caught maybe one or two jobs, I believe one with Lykes Bros. and one with Army Base. I worked one day at the Army Base.

Q Mr. Usner, you filed a suit claiming damages for personal injuries sustained by you on April 28, 1964 while you were employed by T. Smith & Son. Would you tell me generally what happened that day and on what vessel you were on and just generally all of the facts.

A I don't have no notes with me exactly now. I think it was with Luckenbach, was working a barge of steel at number three hatch and was using a breakout hook at number two hatch.

Q Excuse me. When you say you were working a barge with steel do you mean you were unloading?

A Unloading the barge into the ship.

Q What time of day had you gone to work?

A 8:00 o'clock.

Q And what time of day did this accident happen?

A Around 2:30 in the evening.

Q And you state that the accident occurred while loading the steel into number three hatch?

A Yes, was using a breakout hook, I was running the

breakout hook most of the time, there was four men down there hook it up and it was low, so then nobody was working the number two hatch and he swung that boom on the end on that steel so we could hold it up and run the wires on each end and make faster time.

Q Well, let me ask you this: At the time you were injured you were aboard the barge?

A The barge. I was running the breakout hook.

Q What is the breakout hook?

A In other words, the end of the steel is here, now, you had about seven or eight feet from the end of the steel to the edge of the barge where it goes up. Well, every tier of steel you take out you got 4 x 4's, leave a space so you can get your wire in and take the whole tier out and—

Q What type of steel was it, scrap or plate steel?

A No, it was about forty or fifty foot long, it was different type bundles, take so many bundles with the breakout hook and hold it up and go into the hatch because they had to give it a little dip to get down there in the hatch, they had two forklifts, they run it on so many loads on this side and so many on the other side to balance the ship up.

Q You were on the barge using the breakout hooks. Now, specifically what do the breakout hooks do?

A In other words, they take number two boom and

swing it around to the edge of that, just like the edge of this steel, and that's staying on the end of that steel in the middle where the hook would come down and they had a wire and I'd slide it under about four feet and I'd give a signal or the derrickman, they had a derrickman up there, he'd pick it up and hold it up, you see, we'd get out the way and hold it up so that end on the other end would be high enough because some of them was laying flat and couldn't get under there and have to wait and take too much time loading the ship, so to speed the work up we use the breakout hook and put an extra set of wires on that, so when he come out with the two empty wires and put the two new wires, while he was going in we was breaking out another load.

Q You were using the—what is it, the crane or derrick?

A No. using the ship gear, ship boom.

Q You were using the boom for the number two hatch?

A To break this out, call the breakout hook, that would be out the way by hanging on the end enough to hold it up.

Q And the breakout hook simply is to raise the steel up in order to get the other two wires?

A Yes, and then we let it down, we'd be ready, we'd be waiting for them to come out, we have the wire all hooked up, just to put it on the hook and go right on in and that would speed the work up instead of waiting for them to let us come out with the wires and then hook a load

up, fish it around and all that and lose a lot of time, was losing too much time in the morning, so we decided to use a breakout hook.

Q The steel would then be picked up by the boom on the number three hatch?

A Yes, two booms, two booms was picking it up.

Q Now, what happened to you?

A I was standing on this edge around—

Q Standing on what?

A On the edge of this iron up on top so I can catch my breakout hook. So when he come around 2:30, he stopped about four feet from me, so he said, "Joe," he said, "Wait a minute," he said, "I'm going to put it right in your hands." It stopped up there for I'd say almost a minute, so when he came down it came down all at one time, so I grabbed what I could, the wire, because the chain was wrapped around my neck, and from the weight being not over the steel but right on the edge, had a tendency to swing back and I went backward like this (indicating) and I landed in that whole pile of lumber like this (indicating). This leg was jammed in the iron, this one was caught and I was in here by the 4 bys on the side of my hip.

So then the foreman hollered tell the fellows to get that chain off of me. They said I had that chain and two cables that must have weighed seventy-five pounds but it never hurt my neck

or anything like that, I got up, I pulled my pants down, I didn't see I was cut anywhere but it was hurting, so we worked the rest of the evening and that night when I went home I couldn't sleep. That leg just pained me something awful and I come in the next day to work.

Q When you refer to this chain and this line—

A Well, that's the fall, in other words, from the boom, you got two wires about that thick and on there is attached the chain about five foot long with a hook about that thick around, it's a cargo hook.

Q Now, again, this wasn't a breakout?

A The breakout hook, they call the breakout hook, at that number two hatch it's a separate boom in other words, separate one and that's what comes down. You see, you only had a winch running and a derrickman.

Q You only had what?

A A winch runner and a derrickman because the winch runner couldn't see anything. He was up behind the boom, No. 2 hatch, so they had a man on deck standing looking down in the barge and he flagged the man either up or down, the winch runner could bring that hook up or down.

Q Why was that?

A Chester Weatheroy, he was the hold man, he was just the man they took out the hold, and extra man to put up there. He's not a regular derrickman,

either the winch runner he had up there, he was a regular hold man but they use him now and then to run a winch when they do something like that.

Q Do you know who was operating the winch?

A Yes, Antoine, I know him as Antoine.

Q Who are Weatheroy and Antoine?

A They work in the hold like I do.

Q They're employed by—

A T. Smith

Q Do you know what made the line come down too fast?

A I don't know. All I know it was coming down and I was grabbing what I could grab because I sure didn't want it to hit me in the head.

Q Was it free-falling or what?

A Just like I told you, it was stopped, the bottom of the hook was high as this ceiling here and then a man be over here on the deck side, wait a minute, hold everything, I'm going to give it to you, I'm going to put it in your hands. It would come down slow and I could take the wires off, you see, so this time he said wait a minute, and I wait, and when it come down I couldn't watch him, I was watching the hook. Now, if the signal he give and the winch runner took it for something else, but he come down fast, all I know it come down, when it did, when I seen it I swung around

and tried to grab as much as I could because I knew I was on top, I was about five or six foot high on that iron and the 4 bys was on the floor which made a fall of about a good four and a half feet.

Q You say you fell on these 4 x 4's?

A It dragged me off the top, from the weight of the two falls and the chain and the hook. You see, that's what laid over my shoulder and not being exactly over the steel, more this way, you see, because I had to pull it a little bit to get it, so I went back with all the weight.

Q Now, where did these 4 x 4's come from?

A Underneath the steel, they were sleepers, what they call sleepers, in other words, when they start the bottom of the barge they laid 4 x 4's all over the bottom, six or eight foot apart and then they put as much steel going from one side of the barge to the other and when they come up again with another tier they put more 4 bys until they get to the top.

Q Now, the ones that you had fallen on, had they been removed by you all and thrown over on the side?

A The four of us were throwing them, getting them out of the way. If we let them on top, they had a tendency when they pick up the steel, they'd be falling all over your head and everything else, they had to be put out of the way.

Q And those that you fell on had been put out of the way?

A Oh, yes, we had all went to that one end, that's the only hold we had to throw them in. There's a space from this table to the other side, about six or eight feet that it was all the way down to the floor with nothing.

Q When you say you threw them in a hold—

A Well, that's what they call the floor, throw them down on the floor.

Q Just the floor?

A Yes.

Q The top deck of the barge?

A Yes, when you're on steel, longshoremen talk, throw it down in the hold, that's the hold.

Q Now, let me ask you this: Did any condition of the barge make you fall?

A Well, I was working pretty dangerous as it was, I had to be careful, I was on the end of that steel to grab that hook and you don't put that hook anywheres, say six foot on top the steel because when they picked up it would be all tangled up, so in order to do that I had to catch that hook every time and take the wire off and hook it around the steel and tell everybody to get out of the way and let the derrickman hold it up.

Q Let me ask you this: Was the steel loaded properly on the barge as you were taking it off?

A Yes.

Q There wasn't anything wrong with the way it was loaded on the barge?

A No, it was the idea of the cable coming down and just pulled me off, you see, that's what happened, I couldn't hold that thing, it come down all at one time. Now, I couldn't see the derrickman give the wrong signal, the right signal or what, all I know it was coming down and I was grabbing and when I seen it it was too late, something comes down all at one time.

Q I see. And who were the names of the other people that were working on the barge with you?

A There was Isidore Mills, Max Turner and Phillip Flitters.

Q And all of those people were employed by T. Smith & Son?

A Yes.

Q Now, the barge was just tied up to the ship?

A Right.

MR. BAUS:

That's All I have.

BY M. YAGER:

Q Mr. Usner, you said you came to work at 8:00 o'clock that morning?

A Yes.

Q Was that the first day that you worked handling cargo on that ship or had you worked there the day before?

A Yes, I think it was the first day.

Q Now, do you remember where the ship was docked?

A By the cotton warehouse, that's from Napoleon Avenue on up they call it cottom warehouse.

Q And she was docked I suppose with her bow upstream, starboard side to the dock?

A Yes.

Q So that the barge would have been along the port side of the ship?

A Was on the outside of the ship.

Q Now, where did you first start to work when you went to work that morning?

A Down in the barge.

Q Down in the barge?

A In that barge, we started that barge.

Q Was the barge already there when you came to work?

A Yes, was tied up.

Q Could you tell whether or not the barge had a full load of cargo or had some cargo been discharged previously?

A Well, some barges—that particular barge now I couldn't swear to it but I think it was about half loaded.

Q Was there any indication from these 4 x 4's or anything else that part of this cargo had already been discharged, do you know?

A Well, I couldn't tell. Sometimes you might get a hundred pieces of steel in one barge and another time it might be all the way up to the very top.

Q Was this a flat deck barge?

A It was an open barge. I don't know what you mean by flat deck.

Q Solid flat deck with covers on it?

A No, this was an open barge, in other words, they don't cover a barge of steel, very seldom because the rain don't hurt it.

Q The deck of the barge was flat just like this table?

A And around the edges, about two foot wide.

Q Oh, I see, then it had a hold?

A And then it goes down.

Q I see, and you were working down inside this—

A Down inside.

Q How far below would you say the level of the deck

is where you were working on the barge at the time of your accident?

A The barge, I'd say it must have been a foot below my head.

Q Could the derrickman on the shop see your entire body—

A Yes.

Q — or could he just see a portion?

A No, I was standing up, I was a sore thumb up there.

Q Now, when were these booms both at number three and number two hatch rigged when you went to work that morning?

A Number three hatch, they rigged them when they went to work.

Q The T. Smith longshoremen rigged them, did they?

A Well, I couldn't swear to that because when they holler go to work we got to get ready to go down in the barge and get our equipment and stuff and throw wires, I mean, your back is turned.

Q Now, number three, which boom was it that was out over the barge or was out being used for breakout purposes?

A Number two hatch.

Q I'm sorry, number two hatch, was it the forward or aft boom?

A Aft boom.

Q On the offshore side, of course?

A Yes.

Q Now, was only one fall being used from that boom?

A Yes, one fall, just to hold it up and come back down.

Q This barge was alongside the ship abreast of hatch number three, even with hatch number three?

A Yes.

Q Is that right?

A Well, the very end of it must have been up toward number two hatch, that's the way they spot them where they can work.

Q Where you had your accident, where were you standing with respect to the ship, would you have been even with the forward end of the number three or middle of the number three?

A I would be more to the forward end.

Q You continued working up until the time of your accident?

A I complained to the fellow, you know, it was kind of hurting me, burning me, you know, we worked all the way until 5:00 o'clock.

Q Up until the time of your accident you worked from

8:00 o'clock until about 2:30 doing this same kind of work breaking out?

A Yes.

Q Was the work done in the same way all that morning and that afternoon until your accident, is that right?

A That's right. Now, they had one or two of the other men made a few loads on the breakout hook besides me. I didn't continue to breakout from 8:00 o'clock all the way until the time but I done I'd say three-quarters of it.

Q Now, was the position of the breakout boom, we'll call it the boom at hatch number two, was that changed at any time while you were working that day or was it's position changed?

A No.

Q Now, were you considered part of the gang of longshoremen working at hatch number three?

A Oh, yes. I worked for that man for twelve years.

Q Who was your foreman?

A Bill Krummel.

Q You know how he spells his last name?

A K-r-u-m-m-e-l.

Q Now, were the men that was the winch runner and

the derrickman for hatch number two, were they also part of Bill Krummel's gang?

A They were but they were not regular, regular winch runner or a regular derrickman.

Q I understand that but they were part of his gang?

A Right.

Q He was their boss?

A Yes, but now Antoine is the regular hold man but Chester Weatheroy is what they call a regular extra man, he don't work all the time.

Q There was no separate gang worked at hatch number two as I understand it?

A No, nobody at all.

Q Now, did these same men at hatch number two, the derrickman and the winch operator work there all that day or do you know, up until the time of the accident?

A Yes, I think worked all the way until the time to go home.

Q Now, your accident happened during the daytime, didn't it?

A In the afternoon.

Q So there was no question about you had plenty of light to see during the course of your work?

A That's right.

Q Do you remember whether or not the barge was on an even keel, was it level or was she down by the head or one end or the other listing to one side or the other?

A Not to my knowledge. I just had to be careful and watch for ships to pass because if a ship passed then she wouldn't—

Q She would rock?

A Well, sure, after the ship passed she would get a wake in there but at the time that happened now it was just on an even keel.

Q And the barge was steady?

A The barge was steady.

Q Now, did you or any of the men working on the barge have any complaints about the working conditions, make any complaint to your foreman or to anyone else about working conditions up until the time of your accident? Did you all complain to anybody, did you say something should be done definitely?

A No, he does a lot of hollering.

Q Who's that?

A My boss, William Krummel, hurry up, get a load, get a load, get that damn breakout hook, let's go, they are trying to make time.

Q But as far as you know nobody on the barge had any complaints about the working conditions existing—

A No.

Q — or about the equipment or the gear being used?

A That's right.

Q Is that right?

A That's right.

Q Now, up until the time of your accident did you have any trouble or any difficulty using this breakout winch? In other words, did anything happen that happened at the time of your accident?

A You mean come down fast?

Q Come down fast.

A No, that's the one time it happened and that was it.

Q Now, what about after the accident, did it ever do it, occur again?

A No.

Q After you got up and you continued working as I understand—

A I continued working.

Q Even though you were in some pain?

A Yes, I had some pain but I seen I wasn't cut open or anything like that.

Q Now, did you continue to do this breakout work, same work you did at the time of your accident?

A Well, no, I didn't—I might have made one or two loads but I believe one of the other fellows took over after.

Q Did you see the breakout winch in operation, the hook or the runners, you know, and the chain that you described, did you see that being used though after your accident?

A The same fall being used after?

Q Yes.

A Yes.

Q Did it operate as it had before the accident the same way?

A I didn't notice. I was stooping down and running the wires through after that.

Q Did you see or hear anything unusual occur after your accident—

A No.

Q In the operation of this breakout winch —

A No.

Q — or boom —

A No.

Q — runners?

A No.

Q Now, did the derrickman of hatch number two say anything to you or to any of the men on the barge after the accident?

A No. Mr. Krummel was up there.

Q At the time of your accident?

A Yes. I heard him holler get the chain off the man. It was still on my shoulder like that when I was laying down in there, it was still across me and I couldn't get up with that thing on top of me and the two falls.

Q Did you ever talk to the winch operator or the derrickman at number two after your accident about what happened?

A No.

Q Was the discharge of this barge and the loading of hatch number three interrupted or delayed for any reason that day except for your accident, the few minutes for your accident?

A That's all.

Q That's all?

A That's all.

Q How long would you say the loading operation from the barge to the ship was interrupted by your accident?

A Maybe about five minutes, enough to get me out of there.

Q And then it just picked up again and continued, is that right?

A Continued again.

Q Now, I think you previously testified that you didn't see what the derrickman was doing when this hook came down suddenly, you didn't see what signals he was giving?

A I couldn't keep my eye on him all the time. I had to watch that and I had to balance myself standing on the end. You can glance and throw your eyes up to him every now and then when it's coming down but when I looked up he told me "Wait a minute, I'm going to put it in your hands." Well now, I looked at him like that and I watched the hook and when it come down that was it, there was no—I couldn't have jumped overboard and got out the way.

Q Did the derrickman or anyone on the barge shout any warning to you or do you remember?

A No, they didn't have time to do anything.

Q How far next to this, you said you were standing near the edge?

A Near the edge of the steel, I had to stand on it to reach the hook. In other words, I was on the end of the steel sticking maybe about the length of my shoe in front of me like this and that hook would come about right here, so when he stopped a little higher than the ceiling I was just like this waiting to catch it because I had to grab it and it slow down and come down slow a little further and I could reach it, it's three-quarter inch wire double up with the eyes and they're kind of hard to get off the hook and you had to raise with it and take them off. He had that hook up there, he said, "I'm going to put it in your hands," and when one turns the break loose, just like hitting the brakes on your car and you ain't got no brakes on the car, just that fast, so all I could do was grab what I could grab and with the weight of that and everything I went down in that pile of lumber.

Q What was the reason, if any, for your standing there, why couldn't you have stepped back and waited for the hook to come down and then stepped forward and take a hold of it?

A That's the way we worked all day. In other words, the hook would come right here where I was standing, so you're working all morning and you come back in the afternoon and the hook is going in your hand all morning long, you know, part of the afternoon, and the one time it just stopped dead about three or four feet up in the air from you reaching it, so he says, "Just a minute, I'm going to put it right in your hands," I'm watching that hook come down, when it does come down it shoots all the way down, ain't nothing you can do.

Q Before that your hook came down into your hands on every occasion?

A Oh, yes, perfect.

Q Did at any time it stop out of your reach?

A No, might have been a little too low, he'd get up just a little bit because if you have to get on your tip toes to take up two wires it's kind of rough, so they tried to put it about this height because that's weight on there, they're empty wires but they wires, still four wires on the one hook.

Q Now, was it necessary for you in handling this breakout hook and wires to stand right next to the edge of this cargo, is that right?

A Yes, had to stand in the center wherever the hook fell, when they put the boom around they spotted for the center of the barge and that's where you get.

Q And what happened to be right at the edge of the cargo as you were working it?

A Yes, had to be. If it would have been a foot out or two foot out I'd have to be reaching and then I would have fallen, maybe I would have went down there trying to reach for it but it had to be where you could get it.

Q How about the other direction?

A No, be in the way, it would be in the way, and the boom can come around so far, you see, those

booms don't go completely around, they fast forward and they come so far, but they had the barge spotted where they could break that steel out on that end and if anybody would have been working number two we wouldn't have been able to use it.

Q Now, have you done any kind of work before your accident for two or three years prior to your accident, did you do any kind of work other than longshoring?

A No.

Q Did you have any source of income other than money you earned on the waterfront?

A No, just on the waterfront.

Q That's your only income?

A Yes.

Q And you received injuries to what part of your body as a result of this accident?

A This left hip.

Q Anything else?

A And my right leg.

Q Anything else?

A No. I had an accident a few weeks before that with my wrist.

Q That's your right wrist?

A My right wrist, pulling on some cotton and the bale slipped and the hook went down and I popped something up in here and they sent me to the doctor. It swelled up.

Q Were you still being treated for this right wrist when you had this accident, the one we're talking about today?

A No, I was sent back to work to try it and it had swelled up.

Q How long had you been back to work from this right wrist injury when you had this—

A I wouldn't know if it was a week or a couple of days I mean, I'm going back a year, almost a year and a half.

Q Has your attorney sent you to see any doctors?

A Well, I went to doctors.

Q What doctors have you seen?

A Dr. Brown.

Q Where is he?

A On Prytania Street.

Q Any others?

A Dr. Llewellyn on Tulane Avenue and Dr. J. T. Nix.

Q Nix?

A Nix on Carrollton Avenue. He treated that right leg before.

Q Now, how long were you laid up with these injuries?

A Since April 28th, 1964.

Q To the present time?

A Yes.

Q You hadn't gone back to work?

A No, they wouldn't hire me. The doctor that operated on me told me my discharge was at Smith. They wouldn't give me none. Same way on Union, Roy, Houston & Faust, and they sent me to Dr. Berkett and then they sent me to Alldredge. Dr. Berkett told me to take a few weeks vacation when he examined me.

Q You had an operation you say?

A Yes.

Q What operation did you have?

A Touro.

Q What part of your body?

A Up in this hip.

Q Do you know what it involved?

A No, he wouldn't tell me. He said I'll put you in the hospital and give you a little treatment and he said

in three days you'll be back home, he said ain't nothing to it, we'll make a cut about three inches, and I was in there sixteen or seventeen days and I'm not cut about three inches, I'm cut about a foot.

Q When was this you were in the hospital?

A He never did discharge me either, he told me my discharge was at Smith. When I went to see Smith I could hardly walk. They just dropped all the therapy and all was giving me and Mr. Sidney Belsom was sitting like you behind the desk and they kept telling me to come out, they was going to put me to work and I had to see Mr. Thome, the superintendent for Smith, and his mother died, so he went to New York for a week and when he come back he asked me if I had a lawyer, he said there's a company policy, he said — let me see how he said that, "I hope you don't hold a grudge," and that was it, I ain't been back since.

MR. THORN:

I have to object to this response as not being responsive to the question.

BY MR YAGER:

Q When was it that you were operated upon, the month and year, do you remember?

A I'll have to look that up, I think it was August.

MR. THORNE:

Right, August of last year, the date was August 11th.

A I needed to bring me some notes.

BY MR. YAGER:

Q When is the last time you have seen let's say the T. Smith doctors or the doctors to whom you were sent by T. Smith?

A December 23rd.

Q Of last year, of course?

A Yes. He wished me luck too, no discharge.

Q You say you were never discharged by these doctors?

A Well, he said mine was at the company but he never would give me none. I'm supposed to have one to go back to work to give to the foreman and he harped on it that he wanted one and he sent me to see Mr. Sidney Belsom and he told me if they had time to write up the slip that day, they was working, to call him. Well, he never did call and the next morning I come to work, I was out a whole month waiting for him and then when he told me to see Mr. Thome and Mr. Thome's mother died, that was another week, he had to go to New York, and that's when he called me in the office and told me, "Do you have an attorney." I said, "Yes." He said, "That's the company policy," he sa[illegible], "I hope you don't hold no grudge," and he walked off.

MR. THORNE:

Same objection.

BY MR. YAGER:

Q When did you first ask to go back to work or be put back to work, do you remember when that was?

A Well, when Dr. Alldredge told me my discharge had been on the 23rd, I couldn't walk hardly and I went to see Mr. Belsom that day, I said, "Sidney, this doctor must be crazy, I can't hardly walk, I'm getting all kinds of charley horses in my leg and everything else." He said, "You're just a hypochrondriac." He was sitting in my car and I said, "You get the hell out," and I went home.

MR. THORNE:

Same objection.

BY MR. YAGER:

Q Do you remember when it was you were asked to go back to work or permitted, April or May of this year?

A Yes, I went to hire up when Mr. Thome told me that.

Q Now, have you made any other efforts to get employment anywhere either on the waterfront or elsewhere since your accident?

A Oh, I was with Mr. Krummel for twelve years. Why should I go with anybody else. I worked all day, if I would have went with anybody else I don't know if they would even hire me.

Q Your answer is no, you didn't try to get any other

employment since your accident except with T. Smith?

A That's right.

Q How long did you receive compensation?

A To the 12th of December.

Q Did you receive during that time any other payments from any insurance or State agency or Federal Government or any agency?

A No.

Q That was the only money you received?

A That's it.

Q Now, since that time what if any monies have you received?

A Any money?

Q Right, from insurance companies or from Federal or State Government Agencies?

A No, I don't have anything like that. I've been drawing in the last six or seven weeks this unemployment compensation, $40.00 a week.

Q For the last seven weeks?

A I get seven weeks now, draw $40.00 a week, I mean ain't been paying me nothing since Christmas.

Q How have you been getting along from the standpoint of —

A Pretty rough. Well, my brothers and sisters, they give me a few dollars, I go over there and eat because I got three kids, I got kids going to start school too.

Q Does your wife work?

A No. I have one of them in the hospital twice with appendix attack and never took them out yet, my oldest boy.

Q Now, you mentioned this wrist injury that you had had a couple — I have forgotten, I think you said a couple of weeks before this accident.

A Yes, they told me to wear a wrist band.

Q Had you had any accident or injuries involving your hip or any portion of your body before this.

A No.

Q You were a regular worker for T. Smith but you worked as often as work was available?

A Right, I mean, all the time, never was late. I think I got twelve years with the same foreman, the last twelve years, William Krummel.

Q Had you handled cargo from barges to ships under circumstances similar to the ones we have been talking about today on previous occasions?

A Yes.

Q Had you ever used a breakout winch before?

A Yes.

Q Was it rigged about like the one that was rigged on the Edgar Luckenbach?

A Yes, I'd say about the same.

Q Had you ever worked before when these men that you have named that were acting as derrickmen or winch operator?

A No, winch runner be up there a few times but not the derrickman.

Q This is his first time as derrickman as far as you know?

A No, he was off and on, different types of work, you know, and used derricks and all, used to get up there and run a winch but very seldom.

Q You've seen a lot of derrickmen in your years on the waterfront, haven't you?

A Yes.

Q How would you classify this derrickman in hatch number two whose name was — what was his name, Weatheroy?

A They're subject to make mistakes the same way as the winch runner himself because he's not a regular winch runner, that is, doing it every day, he might get up there one time and then six months later he might never get back up there for six more months and might go a year and then might go

twice in a week, but they're a regular hold man like I am now down in the hold. He used them in a jam. In other words, they couldn't run, hire up with another foreman and just completely get up there and run a winch all day long because they don't have enough experience but they do take a single fall and punch a lever forward and backwards. Like I say, they're subject to make mistakes.

Q The people on the barge —

A Because the two men working every day together, they would know the signals where you get a man that works once every six months and two different men might take a signal, different signal from a regular derrickman and might mean something else.

Q Let me ask you this: We never named the barge. Do you know what the barge was named or number was?

A No, offhand I wouldn't know that barge number.

Q But it was at hatch number three I think you said?

A Number three hatch.

Q That would be what, forward of the amid ship house?

A Forward of the ship, and that barge number would be way down on the side. In other words, the superintendent or somebody, the company would get that number even if they had a barge name, he'll know the number and he would give it to them but as far as the longshoremen knowing that number it

would have to be on black and white that big for you to see it.

Q Now, the people that were working on the barge were all T. Smith employees, were they?

A All T. Smith regular employees.

Q Did you see any of these ship's officers or crew members doing any of this cargo handling work?

A No.

Q As far as you know the ship's officers and crew members did not handle the winch or give signals to the winch runners or anything?

A No.

Q Did you ever hear of any complaint or make any complaint yourself about the condition of the ship's winches?

A On that particular boat?

Q Yes.

A No, not on that particular boat.

Q Do you have any reason to believe there was anything defective or out of the ordinary about the winches being used in number three or number two?

A Well, I'm down in the barge, his foot could have slipped off the brake, it could have happened anyway, you know, a number of ways, it could have happened

somewhere between that winch runner and the derrickman that give that signal.

Q But you don't have any specific information that there was anything defective with the winches, do you?

A Well, I'm like down in this room and it be up there, I couldn't see what was going on.

Q You don't have any specific information though, do you?

A No.

Q Whether the winches were operating properly or improperly?

A I couldn't tell that not being down in the barge.

Q Were there any interruptions in the use of this breakout winch? I think you answered no, is that right?

A No, we didn't have any trouble.

Q And you didn't have any trouble that afternoon after your accident either as far as you know?

A No, as far as I know they didn't. It only takes one time.

Q Now, as I understand your description of the accident, the reason you say that you fell was because this hook came down suddenly, is that right?

A Yes.

Q Did your feet slip out from under you?

A Well, no, I didn't slip right now, well, that thing come — all I could do was reach to grab it and the weight of it just swung me around and set me down in the pile of 4 x 4's laying down on the floor .

Q What did you do, reach forward to grab it or how did you reach when you reached?

A Straight down, I was standing on the edge of the barge like this and the hook was coming here, when I seen it come past I tried to grab it to get out of the way of that hook because they got a chain that big around and about that much and about a thirty or forty pound hook with the wires still on. The first thing I thought about when it was coming down fast was my head.

Q You were demonstrating with your feet set apart?

A Balancing yourself.

Q Weren't your feet apart?

A Yes, all the time, every time I reach for that.

Q Were your hands extending overhead and somewhat to the front, is that true?

A Yes.

Q What was the first thing coming down, hanging down, what were you reaching for, in other words, from this breakout winch, would that have been a hook?

A Well, they got wires, they had two wires on there double which would hand down I guess about from

the top of this part here to the floor and they hooked on the hook, so when it come down that hook got to come about this height, you got to grab them and take them off.

Q Were those wire slings?

A Two wires, they would be what they call a running wire, breakout wire they call them.

Q Those wires, they belong to T. Smith?

A Yes, that's Smith's equipment, Smith's wires.

Q These wires were hooked onto the cargo hook?

A Yes.

Q Which in turn hooked to the runner going to the winch?

A The cargo hook is hooked onto the winch. Now, these wires that hang down, you could leave them double like this and just pass them underneath the steel, you see, and Chester Weatheroy hold them way up, that would bring that other end high enough to put a round turn on the wire and one on this end, then we let him back it down to the floor again and leave it there and when the two wires come out to number two I'd be on this side, my partner on that side, the same way on the other end, we each grab a wire and shove it on the hook and we get out the way and pick it up and it can go in the hatch on a little slant.

Q What I was trying to find out on the breakout winch,

you have the wire runner coming down from the head of the boom and attached to the wire runner is what, the cargo hook?

A It's a piece of chain and then they got a flat piece of iron and the shackle goes in that and the hook on the bottom of the chain, it's rigged where it can just go up and down like an elevator.

Q Whose cargo hook and chain were those?

A Ship's gear.

Q And from this cargo hook hung down the wires that you talk about?

A That's right.

Q How far down from the hook would you say they would hang down?

A I'd say about five feet, they double up but they are still about five feet.

Q Now, then you were demonstrating a few minutes ago reaching up were you reaching up trying to grab the cargo hook or the wires?

A Well, in other words when you stand here and it goes down it would be about this far from my face when it comes down, so I watch the hook and the wires come down and when he — he was watching me too, when it reached about this height where I can get it in this hand and to take the wires off and he stop it.

Q When you were demonstrating a moment or two ago about reaching up what were you reaching for?

A Oh, when he stopped up there, you see, he said wait a minute, because he never did stop all morning, you see, when I be there ready for him that hook would come down like that and would just stop where I wanted it.

Q Were you reaching for the hook or for the wires?

A Reaching for the hook. The hook always come down, the wire is first and then the hook.

Q The wires were hanging in front of you —

A Right.

Q — when you were reaching up like that?

A No, the whole thing stopped, the wires and all was up there, four feet from me to reach any kind of wire, he just stopped in the air, so then it made me think a little while and he said "Wait a minute, I'm going to send it down," and I'm reaching to grab like I was doing all morning but it come down like a ton of bricks.

Q What would you normally grab when it would come down, the wire or the hook?

A When it come down slow I just put one hand on the wire and when it get to the hook, you know where to stop it.

Q You described this being about four feet above your finger tips.

A Above my head when he stopped the wires and everything.

Q That was the wire?

A Yes, that was the end of the wire, the bottom of the wire, the hook would be almost to the ceiling with the wires double and hanging down, that was still four feet above my head.

Q So the bottom of the wire being four feet above your head, the hook would have been another five feet above that?

A Oh, yes.

Q When it came down suddenly as you described did the cargo hook itself actually come down and touch you or did the wires touch you?

A No, it went over my back, the wires, when it come all of a sudden and I'm standing here and then the wires, it whipped and when I went to grab like to get those two falls, the hook was down across my shoulder, the chains and all went back of me.

Q So the hook actually touched you on the shoulder?

A No, the chain did, the hook missed me completely.

Q The *chain?*—

A Just the chain, in other words, it slid down and when he stopped when it was resting on my shoulder and the weight of the fall and everything just pulled me back down to the 2 x 4.

Q With the chain resting on your shoulder where would the hook have been?

A Back down here by my ass.

Q Even with your seat?

A Yes, that thing come down pretty fast, it just dragged me off the top, the weight of it dragged me right over the top of there.

Q This was all in one sudden motion, is that right, this coming down?

A That's all at one time.

Q No interruptions?

A No stopping, just like you took a brick and held it up on the window and dropped it right on down.

Q Well, correct me if I'm wrong but from what you describe that hook itself, just referring specifically to the cargo hook —

A Yes.

Q — if it had been about nine feet above your head as I think you said, four feet, the wire, and then another five feet, the hook would have come down over ten feet, wouldn't it?

A Not quite, I don't believe it was quite that high.

Q It came down even with your back, let's say if the hook would have come down to be even with your

back it would have come down some ten foot or more?

A It come down pretty good, it was a good eight feet up there from the top of the hook where I was standing.

Q You remember what was the next thing that was done with that breakout fall, did they pick it up or just stop it there or what?

A They stopped it right there. It was all across my shoulder and I was in the 4 bys, I guess he was scared it would jerk me clean up in the air, I imagine.

Q After you got up what was done, it was picked up again?

A Yes, and in a little while they picked it up again.

Q And lowered it back down to continue work?

A Well, I wouldn't know how many minutes or exactly how long it was but went back to work because I think they took one or two loads while I was standing on the side, I had pulled my drawers down to see if I was hurt.

Q How do you feel at the present time?

A I still hurt.

Q Whereabouts?

A In the same spot.

Q In the hip?

A Same spot in the scar where he operated.

Q Is that the left hip?

A Left hip. It sets stiff and everything else.

Q Do you do any work around the house?

A Light work.

Q Physical work of any kind?

A Light work around the house, cut the grass, sometimes the kids help me. I'm trying to get exercise. I rode a bicycle, stuff like that.

Q Had you seen any doctor since you saw a doctor about December 23rd?

A Yes.

Q Who was that?

A Dr. Llewellyn and I seen Dr. Brown and I seen Dr. Nix.

Q When is the last time you have seen a doctor?

A Two weeks ago.

Q And who was that?

A Dr. Nix.

Q Had you received any treatment from these doctors

or just examinations, have they given you any kind of treatment?

A X-rays, give me X-rays and stuff like that.

Q Any kind of physical therapy, any medicines or anything like that?

A No.

MR. YAGER:

That's all I have.

BY MR. THORNE:

Q Mr. Usner, I represent T. Smith & Son. This gang that you worked in was something of a specialty gang, was it not, you all did a certain type of work?

A We worked everything come in the river.

Q You worked cargo where you have a winch runner and flag man?

A We had regular ones but they was at number two hatch, they were talking that steel in there.

Q How many were in Krummel's gang on this particular ship?

A I think he had twenty or twenty-one, he had that regular extra man.

Q How many of the gang were working the barge as opposed to the ship itself?

A In the barge itself?

Q Yes.

A Four of us.

Q And in addition to that you had a man acting as derrickman and a man acting as a winch runner for this breakout boom?

A That's right, because they use the lift machines in the hold and need that many men down there, you see. They had the two forklifts like I tell you and they just went on the side and put the wood and whatever they had to do in the hold for these lifts to set it down on and help them get out when they get stalled or something like that.

Q Give me a rough estimate how many times you did this type of work actually getting down in the barge, from the barge to the ship to load it.

A Oh, I'd say for eighteen years off and on, whenever he had work, derrick work.

Q Literally hundreds of times you did this type of work?

A Oh, yes, hundreds of times, me especially.

Q Was it also customary practice to use the breakout boom doing this type of work?

A Well, like I say if they didn't have five gangs on the ship he could do it, if they had another gang,

if they had put cargo in number two they wouldn't have been able to do it.

Q But if you had an open hatch and free boom you would use a breakout because it facilitates the work?

A Yes, that's right, it speeds it up.

Q You all hadn't used the breakout when you first started, is that right?

A I believe we made a few loads without the breakout hook and it was too slow. In other words, when they come out and was hanging and had to wait for us to get them wires underneath, then we had to take those wires of and break it up and get it out the way but this way we had a load at all times by using the breakout hook.

Q About what time did you start using the breakout hook?

A I think between 9:30 and 10:00 o'clock. He said it was too damn slow.

Q You had been working with the breakout hook from that time until the time being except for the hour you knocked off for lunch?

A Maybe once or twice I didn't get — if I was busy maybe one of the other fellows take the breakout hook and —

Q By and large during that time you and your partner had been working the breakout hook?

A Yes, while he hold the wires in his hand.

Q And as I appreciate it you would get the breakout hook and secure it to the forward end of the bundle and then they lift it up?

A Yes, tell everybody to get out the way.

Q And the other man would hook it back off on the aft end?

A On the opposite end.

Q Who was working with you on the forward end?

A Isidore Mills.

Q Did you all have some sort of arrangement where you all were alternating catching the hook as it comes down for a load or you did it all the time?

A No, I said I done three-quarters of it.

Q About one quarter of the time he would catch it?

A He would catch it, yes, he caught a few loads like that.

Q Give me just a rough estimate of say how many loads you had handled with the breakout hook before this accident happened?

A It's a rough guess.

Q Yes, just a rough guess.

A Could have been twenty-five loads.

Q And on these prior occasions in each instance you would just stand roughly in the same position that you were standing before and the hook would be lowered down to about chest high?

A That's right.

Q And it would be lowered down about maybe a foot and a half from you, is that the way they had been lowering it within your reach?

A Closer than that, a little closer than that but he always comes down steadily because you had to stand up there and watch the ship because I had to get out the way because the barge is going to rock because we only have one or two, it didn't rock too bad when we started but the rest of the day we didn't have any trouble.

Q Would it be fair to say that at least prior to this accident you had some confidence in your derrick-man and in your winch runners that you would let that thing come down that close, that hook? Prior to that accident you must have had some confidence in their ability to get it down there?

A No, I don't trust nobody, not on that type of work. You got to be on your toes all the time .I don't care if you got a man twenty-five years running a winch, I been out there long enough to know it just takes one time for you to get hurt and if you're not, I mean, anything could happen, the brakes could slip, he could come out fast and swing the wires right off the hook and drop them down which has been done many times.

Q Perhaps you don't understand my question. My question to you is prior to your accident, the fact that you were standing within about a foot of where they were lowering the hook indicates to me that you had some confidence in their ability to lower that hook properly, is that a fact?

A In other words, I'd watch that hook, when that hook got ready to come out, I'll be standing four or five feet away from it up against the side of the barge, when I see it swing out then I'd walk over in and get in my position for him to come down and he had to watch me and stop that thing where I could take it off.

Q But once he started to come down you would come in, get in position where he was coming down about a foot from you?

A Once that hook comes straight out.

Q It comes right straight down?

A Yes, and I be right there.

Q And you didn't have to be right there, did you?

A Yes.

Q Why?

A How was I going to get in? The foreman is hollering let's get it. You don't stand back, you get where the work is.

Q Is that what the foreman told you on this day, he told you that?

A He hollered once or twice let's go, let's get the hook.

Q Did he tell you to stand up almost directly under the hook?

A No, he don't tell you where to stand.

Q You decide where to stand?

A Yes, you have to stand where you can get the hook, you can't walk out there in slow motion and drag along, you have to be on your toes and you got to get that load up and get that stuff ready for them.

Q Now, after your accident how many loads did they handle, just roughly?

A They might have handled fifteen loads.

Q As I appreciate your previous testimony this was the only time they had any difficulty with the load?

A With stopping it up there, so high.

Q And as I appreciate it to the best of your knowledge the fact that this thing came down suddenly was due to a mistake on the part of either the derrickman or the winch operator, is that right?

A That's what I think.

Q Where was the derrickman standing when you last saw him? You testified you can't remember, you have to watch that hook.

A You had to glance up, I'd say I was standing here on

the end of the steel, he would be in the corner of that room but on top the ship.

Q He was on the weather deck?

A Yes, he's down there.

Q When you last saw him he was looking at you?

A Well, the only time I seen him when he told me, he said, "Wait a minute, I'm going to put it in your hands, so I glanced up but I didn't see what signal he give or what he done.

Q What sort of signal was he giving, verbal or just motioning with his hand?

A Either got to get up there like this, some derrickmen use this to get up, two fingers, some will do that, tighten up, some will back down, they vary, different operators. Some of them that's been like the regular operator and the winch runners they got their signals and they know just what they are, even stop in so many feet but I couldn't exactly say what signal he give.

Q But he was in a position to see where you were, you were right out there on the top of the cargo?

A Yes, he seen me and I could see him, there was nothing obstructing his view at all, we could see one another good.

Q And it was customary for you to stand, to catch this hook, you would stand on top of the cargo that was to be discharged?

A Oh, yes, that's right.

Q And it was also customary for you when they are tied like this with the dunnage to take the dunnage as you would uncover each tier, you had to get the dunnage out the way so you just tossed it back in the hold behind you?

A Wherever you got an empty place. If they have one on the side we could have dropped it down on the side.

Q On this particular barge the only place to drop it was in the —

A Was on the forward end.

Q Was the forward end?

A Yes.

Q And that was about eight feet from the edge of this cargo?

A Oh, yes.

Q And how high again was the cargo from the bottom of the barge, about waist high, chest high, how high was it?

A The cargo we was working?

Q Yes, you were standing on top of it. How high was that?

A A little higher than man height and then you had

the 4 bys, I guess they were two foot high but they were all crossed, those things, sixteen foot long, they're solid oak.

Q You don't stack them, you throw them?

A Yes, sir, you don't have to get down there and make a stack and make them neat because they have to go wherever the barge is going, they belong to the barge people so they'll tell you throw them all on end out the way.

Q Do you remember where Mills was standing when this particular load suddenly came down?

A I wouldn't know if Mills was—I think he was in the barge but he was in back of me. In other words, the ship was here, the barge was here and I was standing in the center and he must have been over in here against the side of the barge.

Q But within a few feet of you, would that be right?

A Yes, within a few feet.

Q And was he hit by this falling chain or anything?

A Oh, no, no.

Q And it was actually the weight of this chain and the slings and everything that carried you backward?

A Yes, just pulled me off the top, dragged me right over the top, I tried to grab and hold as much as I can, I thought maybe I can grab and try to

ride it after I seen it on top me but they're greasy, you see, I even drove a wire clean up in here about an inch and they give me a shot for that and cleaned it out and bandaged it.

Q That's your right forearm?

A My right forearm.

Q That was one of the wires?

A One of the wires, the burrs, you know the wires they got where they spliced the wire, it was sticking out about that long, that's how much I was grabbing to hold on and that doctor even seen it, so he cleaned it up and put me a bandage on it and give me a tetanus shot for it, that was the next day.

Q And when you were carried backward to this open space you landed on your back on top of this dunnage, is that right?

A All in between these 4 bys.

Q On your back?

A I was in other words like this, I was a little bit to this side like this winch down in there and had this leg here was up in the steel, you know, the bundles, and this leg was like that and there I was.

Q So your legs would have been about on the level with your face, in other words, you're just laying down in there with your legs sticking up?

A A little higher than my face, and I had all that chain and all on top of me there but that was over my back and like this over my shoulder, around my neck here.

Q How did they manage to get you out of this, were you able to get out yourself?

A I got up.

Q Did they have to take this stuff off you before you could get up?

A No, no, no, it was laying there, all you had to do was push it and it was swinging from up there and I got out and I pulled my pants down.

Q Now, this particular job that this acting winch runner was doing as a winch runner job, was that a relatively easy job?

A Yes.

Q You don't have to swing the boom or worry about anything, all you had to do was raise or lower it?

A When you're working the barge all he does is use his hands.

Q And his only function is to raise it up so that—

A And bring it down.

Q And bring it down?

A That's all. That wasn't to swing either way, down

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I tell him to let it down he let it back

Q And this pa
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of work before?

A He run the

winch.

Q I mean thi
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Q I'm not qu

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vouldn't, sometime he'd go eight months
doing it and then he might do it half a
might put somebody else and they keep
here one or two days but he was not a
winch runner.

Q What abo
worked

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as a derrickman before?

A Not too m

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Q But he ha

l?

A Well, not

rgo, just that type, you know.

Q Just this t

pe of thing —

A Yes.

Q — where you're loading from barge to ship?

A Yes, but very seldom.

Q Now, except for this puncture in your right forearm you did not hurt your wrist as I understand during this accident?

A No.

Q You had hurt it before?

A I hurt it before but my leg was hurt, my right leg. I complained with that left leg in the hold falling down in between dunnage and I went to Mr. Villarrubia and he said we'll send you to the doctor later but I never did get to the doctor.

Q You had had some trouble with your right leg before this accident?

A Oh, 1960-1961 I was running a forklift on the wharf and the watchman stepped out and the wharf was all wet and on the brake pedal, you know how you got a little tit comes up to keep your foot from slipping off, well, it was worn out completely so I stood upon the brake to keep from hitting them and by the time I got out the wharf I couldn't hold it, my foot slipped off and took a piece out of here right out of this little bone.

Q That's out of your ankle?

A Yes, and bring me to the office and put a little merthiolate on it. They knew about it, the next

day I went back there on the ship, I was driving a tractor and I got off and my knee kept getting stiffer and stiffer and I told Mr. Krummel, he said yes, you'd better go the doctor. They sent me to Owens Clinic and I think it was Dr. Day.

Q Let me ask you this: Was this injury still giving you trouble at the time of this accident or had it —

A Yes.

Q It was still bothering you?

A Before that accident and I went up and seen Mr. Villarrubia to go to the doctor.

Q I mean at the time you were hurt.

A Yes, it was wedged in there.

Q No, was it still bothering you before you got hurt, in other words, the day you went to work?

A I see what you mean, yes.

Q Was it bothering you at the time?

A It was bothering me, I went up there twice, he said the next time you get hurt I'll send you to a doctor.

Q Now, when you were last seen by Dr. Alldredge in December of 1964 he did not discharge you as fit for duty, is that your understanding?

A He wouldn't give me a discharge.

Q He would not?

A I asked him for one. I said, "Doctor I got to have one in order to go back to work." He said, "Well, yours is at the company, I wish you luck." I said, "Well, I still got to have a discharge," and I said, "My leg is just killing me now," I said, "I can hardly walk," I said, "I ain't ever got up over twelve pounds on the therapy," they drop it and you raise it up and it just drops.

Q When did you go to Smith feeling that you were able to work, about when?

A I went to try, I believe it was in April — no, it wasn't that long, it wasn't April, it was in — that's when I seen Mr. Thome and then when his mother died was in June.

Q When did you first go to Smith saying I'm ready to go to work, how about a job?

A That's what I think in June, I wouldn't be sure, I'll have to look it up.

Q From the time you last saw Dr. Alldredge which was in December of 1964 until about June of 1965 after this year you didn't go to Smith?

A I went after he told me I was discharged and it was up at T. Smith & Son, I went on the 23rd or the 24th.

Q Did you tell him that you were ready to work then?

A I seen Mr. Sidney Belsom was out there and he got in my car, was sitting in there and I told him.

Q Did you tell him you were ready to go to work?

A I told him, I said, "Sidney, my leg is killing me, I don't know how that doctor discharged me." He said, "You ain't nothing but a hypochrondriac." I said, "All right, Sidney, get out, I'm going home," and I laid around the bed in and out trying to exercise and everything else but I wasn't able to go to work.

Q Are you able to work as a longshoreman at the present time?

A I'm willing to try it and see if my leg is going to hold up. I know I'm not able to climb too much, I'm still getting pain all in the leg.

Q But you haven't tried for anybody except Smith up to now?

A I been waiting on Smith since Christmas. Now, I did work on the 15th, that was before the operation, on the 15th of June, 1964 for Smith.

Q For a couple of days?

A No, for a couple of hours. Of course we did'nt do much, had a derrickman swing a wire under the load and they let me hook on a little while but I couldn't do it and I went back to the Union Street doctors. That's when he X-rayed it and told me he couldn't read the X-rays, to stay on home in bed with the heat pad until he get me an appointment with Dr. Berkett and Dr. Berkett told me to take two weeks vacation.

Q Now, this is the first time you ever filed a law suit, isn't that right, never had to file a law suit before?

A No.

Q Now, have you talked to any of the members of your gang about how this accident happened since the accident?

A No, I never discussed it with them.

Q Do you know whether your attorney has talked to any of the members of the gang?

A I wouldn't know.

Q You haven't given any of their names or suggested he talk to so and so or whoever it may be in the gang?

A Well, my lawyer talked to the witnesses there, you know, Isidore Mills and people like that.

Q Now, this hip that was giving you trouble today, is it your hip that's giving you trouble today?

A Yes, right in the back, right.

Q Below the buttocks?

A Right below the buttocks.

Q What about your right leg, is that all right now?

A No, when I strain it I get knots in it, in other words, this leg here, when they send me to Owens Clinic, to Dr. Day, I went in the room when it

was my turn and pulled my pants up and told him what happened, I though he was going to look at my leg, he said put them on and get the pills, you're all right, so I took the pain pills. When I come back down the next day I couldn't hardly walk, Bill sent me off the ship.

Q Just a minute, when was this, your first accident?

A Either 1960 or 1961 when I told you they took the pins out and when I went back to Dr. Day, I believe the only one there that day, I said I can't hardly walk, my knee was getting stiff, he said there ain't nothing wrong with you, you want some pain pills or you want me to discharge you. I said discharge me. Then I thought he was a little crazy so I went to go to Dr. Peterson, family doctor and he was on vacation and getting in the afternoon, so when I stopped was the first visit I ever made to Dr. Nix, I seen his office, and I went in there and he put me on the table when he run his fingers up this vein, they got three places in there, he said how long is this, I said this is almost two weeks. Well, he says, I'm going to get you some little pills and wrap that up and want you to put some pillows under your foot and go to bed for a couple of weeks until it gets better and I went back to work.

Q If it's agreeable with your counsel, is it all right if we see the reports that these examining doctors have made, Dr. Nix, Dr. Brown and Dr. Llewellyn, if it's all right with your counsel is it all right with you?

A Yes.

MR. THORNE:

That's all the questions that I have. Thank you.

MR. BAUS:

I just have one.

BY M. BAUS:

Q For my own clarification, these two lines that you were going to disengage from this hook, this is the breakout hook?

A Yes.

Q Now, you would go through this operation, you would attach them around a bundle of steel then raise the steel up with the hook attached to the steel?

A Yes.

Q All right, now, how would you get the hooks off the steel?

A When they back it down again, in other words, you follow me here, you got two wires on there, double wires, when he brings it down we've passed, you see, one of the 4 bys, we get behind it, we double that around, put the hook on there and hold it up and take the big heavy wires, when that goes in the hold we double this, so he backs that down and slides them out and lift them out of the way, when the two hooks come out we at that time take the empty wires and put them hooks

on there and when they're clear over in the ship in the hold we walk out and take the same thing that way, you got a load sitting there, we're waiting on them to come out. In the morning we was fighting that thing like that, you see, and them hooks just hanging there and no load going in the ship sometime for twenty minutes and that speeded the works up.

Q In other words, I think this question will solve it. Why didn't you leave when you unhooked the breakout hook after the main lines were attached to lift it up why didn't you leave the lines unhooked?

A Unhooked?

Q Why didn't you leave the breakout lines unhooked so you wouldn't have to lower it again and unhook them?

A You can't leave that wire play all around where you're walking or they get hooks in the bundles going up, we didn't have no place to put them, carry them up and down the barge. You let them people put them back on the breakout hook and raise it out so you don't catch it in the load. You got forty or fifty feet and the end sticking up, it's liable to hook in there when it goes up and liable to be some more.

MR. BAUS:

That's all.

BY MR. YELVERTON:

Q Have you in the past years in your work, have you operated a derrick, have you operated a winch?

A No.

Q You don't know anything about the mechanism or anything?

A No.

MR. YELVERTON:

That's all the questions I have.

STATE OF LOUISIANA

PARISH OF ORLEANS

I, Leonard J. Bossier, Jr., a Notary Public duly commissioned and qualified in and for the Parish of Orleans, State of Louisiana, authorized by the laws of said State to administer oaths and to take the depositions of witnesses, hereby certify that the foregoing deposition of JOSEPH C. USNER, was taken before me at the time and place hereinabove stated; that said witness was by me first duly sworn to testify the truth, the whole truth and nothing but the truth in answer to the questions propounded to him; his deposition being reported by me in shorthand (Stenograph) and thereafter transcribed on the typewriter under my supervision; that the foregoing seventy-five pages contain a true and correct transcript of the deposition of said witness as thus given.

I further certify that I am not of counsel or related

to any of the parties to this cause, or in the employ of any of them, and that I am in no wise interested in the result of said cause.

WITNESS my hand and official seal at New Orleans, Louisiana, this 26th day of August, 1965.

(s) Leonard J. Bossier, Jr.
Notary Public

MOTION TO ENROLL ADDITIONAL COUNSEL

(Number and Title Omitted) (Filed: July 28, 1967)

Now into court comes H. Alva Brumfield, attorney for the petitioner in the above entitled and numbered action and suggests to the court that he wishes to enroll Evangeline M. Vavrick as additional counsel in the above matter.

Respectfully submitted by,

(s) H. ALVA BRUMFIELD
328 Chartres Street
New Orleans, Louisiana 70130
522-2574

ORDER

Considering the above and foregoing motion, it is ordered that Evangeline M. Vavrick be enrolled as additional counsel for petitioner in the above entitled and numbered action.

New Orleans, Louisiana this 31st day of July, 1967.

(s) LANSING L. MITCHELL
JUDGE

MOTION FOR SUMMARY JUDGMENT

(Number and Title Omitted) (Filed: July 31, 1967)

Now comes Union Barge Lines Corporation, defendant, and upon suggesting to the Court that on the basis of the affidavits and documents attached hereto and made a part hereof there are no genuine issues as to any material facts which would render defendant liable herein;

Wherefore, defendant, Union Barge Lines Corporation, moves for summary judgment in its favor, dismissing the complaint as against it, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

ADAMS AND REESE

BY: /s/ GEORGE V. BAUS
Attorneys for Union Barge Lines Corporation
847 NBC Building
New Orleans, Louisiana
529-4655

MOTION TO AMEND COMPLAINT

(Number and Title Omitted) (Filed: August 8, 1967)

Now comes Joseph Charles Usner, Plaintiff, and upon suggesting to the Court that on the basis of the affidavits and documents attached to the motion for summary judg-

ment by Union Barge Lines Corporation that Plaintiff wishes and is entitled to amend the original complaint filed herein to substitute the name of Ohio Barge Lines in the place and stead of Union Barge Lines Corporation.

By: /s/ Evangeline M. Vavrick

LAW OFFICES OF H.
ALVA BRUMFIELD
328 Chartres Street
New Orleans, Louisiana
70130
522-2574

MINUTE ENTRY August 9, 1967 Mitchell, J.

HEARING ON VARIOUS MOTIONS, ORDER GRANTING MOTION OF UNION BARGE LINE FOR SUMMARY JUDGMENT; AMENDING COMPLAINT; SUBMITTED AS TO MOTION OF LUCKENBACH FOR SUMMARY JUDGMENT

This cause came on this day for hearing on motion of defendants Luckenbach Overseas Corp. and Isthmian Lines, Inc., for summary judgment under Rule 56 F.R.C.P.; and motion of defendant, Union Barge Lines

Corp., for summary judgment; and motion of plaintiff to amend complaint.

PRESENT: Evangeline Vavrick
Attorney for Plaintiff
James Blazek, Esq.
Attorney for Union Barge Line Corp.

M. D. Yager, Esq.
Attorney for State Marine Lines, Inc. and Luckenbach Overseas Corp.

Argument.

On motion of defendant, Luckenbach Overseas Corp. and Isthmian Lines, Inc., for summary judgment under Rule 56 F.R.C.P.; same is SUBMITTED.

There being no objection:

IT IS ORDERED BY THE COURT that motion of defendant, Union Barge Lines Corp., for summary judgment, be, and the same is hereby ,GRANTED.

IT IS FURTHER ORDERED BY THE COURT that motion of plaintiff, Joseph Charles Usner, to amend complaint, be, and the same is hereby, GRANTED.

Jack E. Yelverton, Esq.
H. Alva Brumfield, Esq.
George B. Matthews, Esq.
George V. Baus, Esq.

AMENDED COMPLAINT

(Number and Title Omitted) (Filed: August 8, 1967)
TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION.

Now comes Plaintiff and moves the Court for an order permitting him to amend his complaint filed herein in the following particulars to wit:

I.

That wherever the name of Union Barge Lines Corp. appears, the name of Ohio Barge Lines should be substituted therefor.

II.

That the aforementioned corporation is a foreign corporation doing business in the State of Louisiana.

WHEREFORE, complainant prays that a copy of the original complaint and this amended complaint be served on Ohio Barge Lines and further prays for judgment as originally prayed for herein.

And for all general and equitable relief.

By: /s/ Evangeline M. Vavrick
LAW OFFICES OF H. ALVA BRUMFIELD
328 Chartres Street
New Orleans, Louisiana 70130
522-2574

Please serve:
Thru Secretary of State—
Ohio Barge Lines
P. O. Box 126
Dravosburg, Pennsylvania 15034

MINUTE ENTRY August 11, 1967 MITCHELL, J.

ORDER DENYING MOTIONS OF LUCKENBACH AND ISTHMIAN LINES FOR SUMMARY JUDGMENT

This cause came on for hearing on another day on motion of the defendant, Luckenbach Overseas Corporation, erroneously designated Luckenbach Steamship Co., Inc., and Isthmian Lines, Inc. for a summary judgment in their favor, dismissing the complaint against them.

Present:
Evangeline M. Vavrick
Attorney for plaintiff
M. D. Yager, Esq.
Attorney for defendants

IT IS ORDERED that the motion of the defendants, Luckenbach Overseas Corporation and Isthmian Lines, Inc., is denied.

MOTION FOR REHEARING OR, IN THE ALTERNATIVE, TO AMEND ORDER

(Number and Title Omitted) (Filed: August 28, 1967)

Now come Luckenbach Overseas Corporation and Isthmian Lines, Inc., defendants, and move this Honorable Court for the rehearing of the motion for summary

judgment, filed herein on behalf of the defendants, which was denied by order of this Court entered on August 17, 1967, and state as grounds therefor that there are no genuine issues as to any material facts which will render defendants liable herein and that the order of the Court was contrary to the law applicable to the undisputed material facts herein;

In the alternative, Luckenbach Overseas Corporation and Isthmian Lines, Inc., defendants, move this Honorable Court to amend the aforesaid order denying the motion for summary judgment to permit an interlocutory appeal pursuant to Title 28 of the United States Code, Section 1292(b);

Wherefore, defendants move for rehearing of the motion for summary judgment and for dismissal of the complaint as against them or, in the alternative, defendants move to amend the order denying the motion for summary judgment to permit the taking of an interlocutory appeal.

TERRIBERRY, RAULT, CARROLL,
YANCEY & FARRELL

By: /s/ M. D. Yager
Attorneys for Luckenbach
Overseas Corporation and
Isthmian Lines, Inc.
2141 International Trade Mart
Building
2 Canal Street
New Orleans, Louisiana 70130

MINUTE ENTRY August 30, 1967 MITCHELL, J.

ORDER GRANTING MOTION OF LUCKENBACH AND ISTHMIAN LINES FOR, AMENDED ORDER OF AUGUST 11 1967

This cause came on this day for hearing on motion of Luckenbach Overseas Corporation and Isthmian Lines, Inc., Defendants, for rehearing or, in the alternative, to amend order.

Present:
Evangeline M. Vavrick
Attorney for Plaintiff
George B. Matthews, Esq.
Attorney for Union Barge
Line Corp.

M. D. Yager, Esq.
Attorney for Luckenbach Overseas
Corp. & Isthmian Lines

IT IS ORDERED BY THE COURT that motion of Luckenbach Overseas Corporation and Isthmian Lines, Inc., Defendants, for rehearing or, in the alternative, to amend order, be, and the same is hereby, GRANTED, insofar as the order of August 11, 1967 be amended.

ORDER AMENDING ORDER OF AUGUST 11, 1967

(Number and Title Omitted) (Filed: August 30, 1967)

In view of the fact that the order rendered herein on August 11, 1967 denying the motion of Luckenbach Overseas Corporation and Isthmian Lines, Inc., for sum-

mary judgment involves a controlling question of law, to wit, the validity of the doctrine of operational negligence as a defense.

IT IS ORDERED that the order rendered herein on August 11, 1967 be amended to show that there exists a controlling question of law, to wit, the validity of the doctrine of operational negligence as a defense in this cause and as to which defense there is a substantial ground for difference of opinion and accordingly, an immediate appeal may materially advance the ultimate termination of the litigation.

New Orleans, Louisiana, August 30, 1967.

/s/ LANSING L. MITCHELL
UNITED STATES DISTRICT COURT

MOTIOIN TO ADD CO-COUNSEL

(Number and Title Omitted) (Filed: September 7, 1967)

Now comes Lemle & Kelleher, attorneys, and move that they be added as co-counsel of record for Luckenbach Overseas Corporation and Isthmian Lines, Inc., defendants herein, and in view of the subjoined consent of Terriberry, Rault, Carroll, Yancey & Farrell, counsel for Luckenbach Overseas Corporation and Isthmian Lines, Inc.

IT IS ORDERED that Lemle & Kelleher be and they are hereby added as co-counsel of record for Luckenbach Overseas Corporation and Isthmian Lines, Inc.

New Orleans, Louisiana, this 8th day of September, 1967.

/s/ LANSING L. MITCHELL
UNITED STATES DISTRICT COURT

SUBMITTED:

LEMLE & KELLEHER

BY: /s/ Thomas W. Thorne, Jr.
National Bank of Commerce Building
New Orleans, Louisiana 70112

CONSENTED TO:

TERRIBERRY, RAULT, CARROLL, YANCEY & FARRELL

BY. /s/ M. D. Yager
2141 International Trade Mart Building
2 Canal Street
New Orleans, Louisiana 70130

ORDER GRANTING INTERLOCUTORY APPEAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Misc. No. 856

LUCKENBACH OVERSEAS CORPORATION and ISTHMIAN LINES, INC.,

Petitioners,

versus

JOSEPH CHARLES USNER

Respondent.

On Application for Leave to Appeal from an Interlocutory Order

---

Before BROWN, Chief Judge, COLEMAN and SIMPSON Circuit Judges.

BY THE COURT:

Leave to Appeal from the interlocutory order of the United States District Court for the Eastern District of Louisiana, entered on August 11, 1967, in this cause be, and the same is hereby GRANTED.

(ORIGINAL FILED: October 12, 1967)

NOTICE OF APPEAL OF LUCKENBACH OVERSEAS CORPPORATION AND ISTHMIAN LINES, INC.

(Number and Title Omitted) (Filed: October 17, 1967)

TO. HON. A. DALLAM O'BRIEN, JR.
Clerk of Court
United States District Court
400 Royal Street
New Orleans, Louisiana
Evangeline M. Vavrick
328 Chartres Street
New Orleans, Louisiana 70130

Pursuant to the order of the United States Court of Appeals for the Fifth Circuit entered on October 12, 1967 granting leave to file an interlocutory appeal, Misc. No. 856, notice is hereby given that Luckenbach Overseas Corporation and Isthmian Lines, Inc. appeal to the United States Court of Appeals for the Fifth Circuit from the interlocutory order rendered herein on August 11, 1967 denying the motion of Luckenbach Overseas Corporation and Isthmian Lines, Inc. for summary judgment and from each and every portion thereof.

New Orleans, Louisiana, this 17th day of October, 1967.

TERRIBERRY, RAULT, CARROLL, YANCEY & FARRELL
and
LEMLE & KELLEHER
BY: /s/ Thomas W. Thorne, Jr.
Attorneys for Appellants

CLERK'S CERTIFICATE

I, A. DALLAM O'BRIEN, JR., Clerk of the United States District Court for the Eastern District of Louisiana, do hereby certify that the foregoing 66 pages contain and form a full, true and complete record in the below numbered and entitled cause:

C.A. 15531 Usner vs. Luckenbach SS Co., Inc., et al.

WITNESS MY HAND and the seal of said Court at the City of New Orleans, Louisiana, this 24th day of November, 1967.
A. Dallam O'Brien, Jr., Clerk
By: /s/ R. J. Walsh
Deputy Clerk

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 25344

LUCKENBACH OVERSEAS CORPORATION and ISTHMIAN LINES, INC.,

Appellants,

versus

JOSEPH CHARLES USNER,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

---

(July 3, 1969)

Before AINSWORTH and SIMPSON, Circuit Judges, and SINGLETON, District Judge.

SIMPSON, Circuit Judge: This is an interlocutory appeal from an order denying appellants' motion for summary judgment on a claim based on negligence and unseaworthiness by a longshoreman against appellants as owner and charterer of the S/S EDGAR F. LUCKENBACH. The denial of the motion turned upon a controlling question of law as to which there was substantial ground for difference of opinion, i.e., the validity of the doctrine of operational negligence

as a defense to an unseaworthiness action. The district judge certified the question as one appropriate for interlocutory appeal under Title 28, U.S.C., § 1292(b). Upon the district court's certification, this Court allowed the interlocutory appeal.

The sole issue is whether a ship is rendered unseaworthy as a result of the instantaneous negligence of stevedores, this negligence resulting in the injury of another stevedore, when all the equipment and appurtenances aboard the ship are admittedly in a seaworthy condition.

The facts are undisputed. T. Smith & Son, Inc., an independent contract stevedore, was employed to load the appellants' ship with cargo of steel rods approximately 50 feet in length. Slings, secured to booms, were being used to carry bundles of rods from the pier onto the vessel. The slings were lowered into place by the booms, and were attached to the bundles of rods. On the day the plaintiff was injured, the loading operation had proceeded for some time, until on one occasion when the plaintiff was preparing to affix the sling to the rods, he noticed that the lowered sling was just out of his reach. The plaintiff motioned to the flagman to direct the winch operator to lower the slings further. The winch operator then proceeded to lower the slings, but he lowered them too far causing them to strike the plaintiff, knocking him down onto the barge, causing him injury. Neither before nor after the accident was any trouble experienced with the winch booms, slings, or any other equipment; nor is there any contention that the wiches were operated in a systematically negligent manner that would constitute unseaworthiness. The only way in which the ves-

sel could be said to be unseaworthy would be if this one instance of operational negligence on the part of the stevedore operating the winch could be said to constitute unseaworthiness.

The uncertainty and confusion in this area of the law has resulted from the Supreme Court's per curiam opinion in *Mascuilli v. United States*, 337 U.S. 237, decided on May 22, 1967. In its per curiam opinion, the Supreme Court granted certiorari and reversed the judgment of the Third Circuit, citing only two cases: *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423 (1959), and *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944).

The district court had held in *Mascuilli*, among other things, that the stevedores had only been instantaneously negligent in handling seaworthy equipment; therefore, the vessel could not be said to be unseaworthy. *Mascuilli v. United States*, D.C.E.D.Pa. 1965, 241 F.Supp. 354, aff'd per curiam, 358 F.2d 133.

The question, then, is whether *Mascuilli* abolished the defense of operational negligence in an action for unseaworthiness. If so, the plaintiff-appellee in the instant case may recover, but if not, recovery is clearly barred since there is no other evidence which would support a finding of unseaworthiness.

Prior to *Mascuilli*, this Court had held in *Antoine* and *Robichaux*,[1] that operational negligence at the moment of injury did not render the vessel unseaworthy. *Mascuilli* raised serious doubt as to the continuing vitality of this holding. That doubt, at least for this Circuit, has been dispelled. "Instant unseaworthiness" resulting from

"operational negligence" of the stevedoring contractor is not a basis for recovery by an injured longshoreman. The question is so resolved by our recent decision in *Grigsby, etc. v. Coastal Marine Service of Texas, Inc., et al.*, 5 Cir. 1969, —— F.2d —— [No. 22451, May 1, 1969]. See Part VI, pages 35-45, slip opinion.[2]

The district court, upon remand, is directed to grant appellants' motion for summary judgment.

REVERSED AND REMANDED.

---

[1] *Antoine v. Lake Charles Stevedores, Inc.*, 5 Cir. 1967, 376 F.2d 443, cert. denied, 389 U.S. 869, 88 S.Ct. 145, 19 L.Ed.2d 146; *Robichaux v. Kerr McGee Oil Indus., Inc.*, 5 Cir. 1967, 376 F.2d 447.

[2] See also *Tim v. American President Lines*, 9 Cir. 1969, ——— F.2d ——— [No. 22,395, March 18, 1969].

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1967

No. 25344

D. C. Docket No. CA 15531 "F"

LUCKENBACH OVERSEAS CORPORATION AND ISTHMIAN LINES, INC.,

Appellants

versus

JOSEPH CHARLES USNER,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before AINSWORTH and SIMPSON, Circuit Judges and SINGLETON, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same

is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions to grant appellants' motion for summary judgment.

It is further ordered that appellee pay to appellants, the costs on appeal to be taxed by the Clerk of this Court.

July 3, 1969

Issued as Mandate:

FILE COPY

Office-Supreme Court, U.S.
FILED
SEP 30 1969
JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. ~~375~~ 47

JOSEPH CHARLES USNER
Petitioner

vs.

LUCKENBACH OVERSEAS CORPORATION and
ISTHMIAN LINES, INC.

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LAW OFFICES H. ALVA BRUMFIELD
EVANGELINE M. VAVRICK
H. ALVA BRUMFIELD
H. ALVA BRUMFIELD, III
328 Chartres Street
New Orleans, La. 70130

Attorneys for Petitioner

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO.

LUCKENBACH OVERSEAS CORPORATION AND
ISTHMIAN LINES, INC.

vs.

JOSEPH CHARLES USNER

PETITION FOR WRIT OF CERTIORARI TO REVIEW
THE DECISION OF THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

Charles Joseph Usner, the petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on July 3, 1969.

CITATIONS TO OPINIONS BELOW

The opinion of the Judge of the United States District Court, Eastern District of Louisiana, Section F, denying defendants' motion for summary judgment, printed in Appendix "G" is unreported.

The opinion of the Judge of the United States District Court, Eastern District of Louisiana, Section F, amending the order denying defendants' motion for summary judgment, printed in Appendix "F" is unreported.

The opinion of the United States Court of Appeals for the

Fifth Circuit, printed in Appendix "B" is reported at ___F 2d ___.

The opinion of the United States Court of Appeals for the Fifth Circuit in Grigsby, et al, vs. Coastal Marine Service of Texas, Inc., et al, printed in Appendix "C" is reported at ___F 2d___.

No application for rehearing was filed.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28, Section 1254 (1) United States Code.

QUESTIONS PRESENTED

(1) Did *Mascuilli vs. the United States* 387 US 237 87 S. Ct. 1705, abolish the defense of operational negligence in an action based on unseaworthiness?

(2) Does operational negligence at the moment of injury render the vessel unseaworthy?

(3) Has the Supreme Court rejected the distinction between operational negligence and unseaworthiness?

JURISPRUDENCE INVOLVED

(1) *Mascuilli vs. the United States,* 387 US 237, 87 S. Ct. 1705.

STATEMENT OF THE CASE

The essential facts of the case are not in dispute and present an incident of operational negligence at the moment of injury.

On September 28, 1964, T. Smith & Sons, Inc., an independent contract stevedore was engaged in unloading a cargo consisting of bundles of steel rods, approximately 50 feet in length from a barge and loading the cargo into the No. 3 hatch of the S/S Edgar F. Luckenbach. The barge was moored along side the vessel; the port and starboard booms at the No. 3 hatch were being used to transfer the cargo from the barge to the vessel. Slings secured to booms, were being used to transport the bundles of rods from the barge into the vessel. The stevedore's employees were using the port winch and boom at the No. 2 hatch to aid in the operation by "breaking out" the bundles before they were lifted from the barge. There function was simply to lift each bundle temporarily so that the slings could be placed on both ends of the rods. Once the slings were secured, the cargo gear at the No. 3 hatch was used to lift the bundle out of the barge and into the vessel.

On the day the plaintiff was injured, he was working on the barge, securing the slings attached to the fall of the "breakout boom" around the cargo. The operation was conducted in this manner and without incident both prior to and subsequent to plaintiff's accident. At approximately 2:30 P.M., the winch operator, operating the No. 2 port winch, lowered the breakout slings just above plaintiff's head and beyond his reach. Plaintiff motioned to the flagman, then standing on the deck of the vessel, to direct the winch operator to lower the sling; the flagman in turn signaled the winch operator. The winch operator then lowered the breakout gear, and in so doing, lowered it too quickly and too far. The gear struck the plaintiff, caused him to fall into the barge and sustain serious and permanent injuries.

On April 27, 1965, plaintiff filed a suit against the defendant claiming benefits pursuant to the General Maritime Law. On July 31, 1967, the defendants filed a motion for

summary judgment alleging that there was no genuine issue as to any material facts and asserting that on the basis of discovery depositions and affidavits all ships gear functioned properly and that if the accident was caused by negligence, that negligence could only have beenthe instantaneous negligence of the longshoremen, which negligence did not render the vessel unseaworthy.

The motion for summary judgment was opposed by plaintiff, asserting that operational negligence as a defense had been obliterated by the Supreme Court of the United States in its per curiam in *Mascuilli vs. the United States*, 387 US 237, 87 S Ct 1705.

On August 11, 1967, defendants motion for summary judgment was denied.

On August 28, 1967, the defendants filed a motion for rehearing of the motion for summary judgment or in the alternative to amend the order denying the motion for summary judgment to permit an interlocutory appeal pursuant to Title 28 of the United States Code, Section 1292 (b).

On August 30, 1967, the District Judge of the United States District Court for the Eastern District of Louisiana entered an order amending the order of August 11, 1967, for the reason that the motion for summary judgment involved a controlling question of law, to wit, " the validity of the doctrine of operational negligence as a defense to which there existed substantial ground for difference of opinion and for which an immediate appeal would materially advance the termination of the litigation."

On October 12, 1967, the defendants were granted leave to appeal from the interlocutory order by the United States Court

of Appeals for the Fifth Circuit. The matter was argued on May 24, 1968, and on July 3, 1969, the United States Court of Appeals for the Fifth Circuit rendered a judgment remanding the matter and directing the District Court to enter the summary judgment.

REASONS FOR GRANTING WRIT

Has the United States Supreme Court rejected the distinction between operational negligence and unseaworthiness? To which of the three questions posed in Mascuilli did the Supreme Court reply affirmatively?

An analysis of the cryptic per curiam in Mascuilli by four of the Circuit Courts of Appeal, in light of the three questions posed in petitioner's brief in Mascuilli and the prior jurisprudence of the Supreme Court has led to the charting of different and distinct courses. The cloud of Mascuilli has resulted in divergent opinons, with the Second and Fourth Circuits rejecting the doctrine of operational negligence as defense to an action based on unseaworthiness, maintining that said defense was rejected by the Supreme Court in Mascuilli, while the Fifth and Ninth Circuits maintained the existence of the defense.

Briefly stated the three issues presented in Mascuilli were:

(1) Did a prior unseaworthy condition come into play by the tight line condition?

(2) Did the negligent handling of proper equipment by the longshoremen create a dangerous condition rendering the vessel unseaworthy?

(3) Was the vessel unseaworthy because the longshoremen

were not equal in disposition and seamanship to the ordinary men in the calling?

It is obvious from the opinions rendered by the Fifth and Ninth Circuits that their analysis of Mascuilli led them to the conclusion that the Supreme Court answered the first of the three questions in the affirmative. It is likewise obvious that the Second and Fourth Circuits subscribed to the theory that the second question was answered in the affirmative.

SECOND CIRCUIT REJECTS OPERATIONAL NEGLIGENCE AS DEFENSE

Candiano vs. Moore-McCormack Lines,Inc., 382 F 2d 961 at 962,

> . . .Grillea and a long line of other decisions of this Court attempting to define where operational negligence ends and unseaworthiness begins would seem to be no longer controlling in the light of Mascuilli . . .
>
> In Mascuilli, the question before the Supreme Court on certiorari, to which the Court gave an affirmative answer, was:
>
> "Does dangerous condition caused by stevedore's negligent handling of proper equipment render vessel unseaworthy and its owner liable for resulting injuries?"

In *Alexander vs. Bethlehem Steel Corporation*, 382 F. 2d 963, decided on the same day as Candiano,

> This case raises the same issue presented in *Candiano vs. Moore- McCormack Lines, Inc.*, 2 Cir., 382 F 2d 961, also decided today,to wit: Can a ship be rendered unseaworthy solely on account of the negligence of a longshoreman during a loading operation? . . . *in Candiano we recognized that the Supreme Court rejected the distinction between operational negligence and unseaworthiness in Mascuilli vs. United States*, 387 US 237, 87 S Ct 1705, 18 L Ed 2d 743 (US May 22, 1967), and thus an affirmative answer must be given to the question posed above. (Pages 963-964) (Emphasis added)

The Second Circuit again stated its interpretation of Mascuilli in *Cleary vs. United States Lines Company* 411 F 2d 1009,

> It is now clear that a ship is rendered unseaworthy by a longshoreman's negligent use of seaworthy equipment. Candiano vs. Moore-McCormack Lines, Inc., 382 F 2d 961 (2 Cir. 1967).

FOURTH CIRCUIT REJECTS OPERATIONAL NEGLIGENCE AS DEFENSE

Venable vs. A/S Det Forenede Dampskibsselskab, 399 F. 2d 2347. decided on June 12, 1968,

> On this appeal, Venable raises an issue that has proven troublesome to the federal courts: To what extent can the

"operational negligence" alone of a longshoreman or his fellow workers give rise to an action for "unseaworthiness"?. . .

Recently in *Mascuilli vs. United States*, 387 US 237, 87 S Ct 1705, 18 L Ed 2d 743 (1967), the Court was squarely confronted with the necessity of deciding whether a vessel could be rendered unseaworthy solely by the longshoremen's negligent handling of otherwise proper equipment (at 350) . . .

Mascuilli must be read as rejecting operational negligence "as a factor in the determination of liability" (at 351) . . .

It is now settled that the negligent misuse of safe and sufficient equipment renders a vessel unseaworthy. See Waldron vs. Moore-McCormack Lines, Inc., 386 US 724, 87 S Ct 1410, 18 L Ed 2d 482 (1967). *Thus, operational negligence has been subsumed under the doctrine of unseaworthiness.* (Emphasis added)

NINTH CIRCUIT
MAINTAINS OPERATIONAL NEGLIGENCE--A DEFENSE

Tim vs. American President Lines,Ltd., 409 F 2d 385 at 389,

A long line of cases in this Circuit has consistently rejected any doctrine of "instant unseaworthiness." We have held

that liability attaches if an act leaves the vessel in an unsafe condition subsequently resulting in injury but does not if the act and resulting injury are simultaneous. . .

In reviewing Mascuilli the Court stated, at page 390,

> *This decision has created considerable uncertainty in the lower Federal Courts as to whether or not operational negligence constitutes unseaworthiness. (Emphasis Added)*
>
> . . . . Fourth Circuit in Venable vs. A/S Det Forenede Dampskibsselskab, 399 F 2d 347 (4th Cir. 1968), using similar reasoning and relying upon Candiano concluded "that Mascuilli must be read as rejecting operational negligence as a factor in the determination of liability."
>
> "However, we do not believe this to be the meaning of Mascuilli. In the petition for certiorari, Mascuilli did not state that there was simply one question presented for review but rather asserted that there were three. . .

At page 391:

> Our examination and study of Mascuilli's brief in the Supreme Court . . . lead us to conclude that the reversal was predicated upon the Court's answer to the first of the above three questions.

FIFTH CIRCUIT MAINTAINS OPERATIONAL NEGLIGENCE--A DEFENSE

Grigsby vs. Coastal Marine 5th Circuit Court of Appeal No. 22451, (Decided May 1, 1969). Slip Opinion page 43,

> . .in Antoine and Robichaux, this Court rejected categorically the notion of "instant unseaworthiness". . .
>
> With deference to our brothers in the Fourth Circuit we decline to follow their holding in Satchell and that written for the panel by Judge Sobeloff in Venable, that Mascuilli rejects out of hand that so-called "operational negligence" defense to thereby impose absolute liability for the resulting "instant unseaworthiness."
>
> This means that we part company at the same time with our distinguished brothers of the Second Circuit if--and the if can be a big one--the concurring opinion of Judge Leonard P. Moore on rehearing in Candiano and Alexander speaks for the Court in the views which indicate that close analysis of intracircuit undulations, aberrations and enigmas, of his own and other (including the Fifth) Circuits had led him to substantial second thoughts about "instant unseaworthiness."
>
> A number of beacons chart the course in this direction. Foremost, perhaps, *is the unlikelihood of the Supreme Court*

undertaking to make such a sweeping choice in the heavy seas of conflict by such an unilluminating pronouncement.
(Emphasis Added)

CONCLUSION

Because of the mystery of Mascuilli, the ambiguity of the Supreme Court's opinion, the conflicts among the Circuits and the importance of the clarification of Mascuilli to the entire maritime industry, it is respectfully submitted that a writ of certiorari should issue.

Respectfully submitted,

LAW OFFICES H. ALVA BRUMFIELD
328 Chartres Street
New Orleans, Louisiana 70130
524-5404

By:
H. Alva Brumfield

and

By:
Evangeline Molero Vavrick

PROOF OF SERVICE

I, H. Alva Brumfield, attorney for the petitioner and a member of the bar of the Supreme Court of the United States, hereby certify that on this day, I have served copies of the foregoing application for writs on:

Mr. Maurie Yager
TERRIBERRY, RAULT, CARROLL,
YANCEY & FARRELL
2141 International Trade Mart Bldg.
2 Canal Street
New Orleans, Louisiana

and

Charles Kohlmeyer
Thomas Thorne
LEMLE,KELLEHER, KOHLMEYER,
MATTHEWS & SCHUMACHER
1800 NBC Building
New Orleans, Louisiana

By mailing a copy thereof, postage prepaid addressed to their respective offices, this day of 1969.

H. Alva Brumfield

APPENDIX A

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

October Term, 1967

No. 25344

D. C. Docket No. CA 15531 "F"

LUCKENBACH OVERSEAS CORPORATION
AND ISTHMIAN LINES, INC.,
Appellants

versus

JOSEPH CHARLES USNER,
Appellee

Appeal from the United States Court for the
Eastern District of Louisiana

Before AINSWORTH and SIMPSON, Circuit Judges and SINGLETON, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions to grant appellants' motion for summary judgment.

It is further ordered that appellee pay to appellants, the costs on appeal to be taxed by the Clerk of this Court.

July 3, 1969

Issued as Mandate:

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25344

LUCKENBACH OVERSEAS CORPORATION and ISTHMIAN LINES, INC.,

Appellants,

versus

JOSEPH CHARLES USNER,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

---

(July 3, 1969)

Before AINSWORTH and SIMPSON, Circuit Judges, and SINGLETON, District Judge.

SIMPSON, Circuit Judge: This is an interlocutory appeal from an order denying appellants' motion for summary judgment on a claim based on negligence and unseaworthiness by a longshoreman against appellants as owner and charterer of the S/S EDGAR F. LUCKENBACH. The denial of the motion turned upon a controlling question of law as to which there

was substantial ground for difference of opinion, i.e., the validity of the doctrine of operational negligence as a defense to an unseaworthiness action. The district judge certified the question as one appropriate for interlocutory appeal under Title 28, U.S.C., §1292(b). Upon the district court's certification, this Court allowed the interlocutory appeal.

The sole issue is whether a ship is rendered unseaworthy as a result of the instantaneous negligence of stevedores, this negligence resulting in the injury of another stevedore, when all the equipment and appurtenances aboard the ship are admittedly in a seaworthy condition.

The facts are undisputed. T. Smith & Son, Inc., an independent contract stevedore, was employed to load the appellants' ship with cargo of steel rods approximately 50 feet in length. Slings, secured to booms, were being used to carry bundles of rods from the pier onto the vessel. The slings were lowered into place by the booms, and were attached to the bundles of rods. On the day the plaintiff was injured, the loading operation had proceeded for some time, until on one occasion when the plaintiff was preparing to affix the sling to the rods, he noticed that the lowered sling was just out of his reach. The plaintiff motioned to the flagman to direct the winch operator to lower the slings further. The winch operator then proceeded to lower the slings, but he lowered them too far causing them to strike the plaintiff, knocking him down onto the barge, causing him injury. Neither before nor after the accident was any trouble experienced with

the winch booms, slings, or any other equipment; nor is there any contention that the winches were operated in a systematically negligent manner that would constitute unseaworthiness. The only way in which the vessel could be said to be unseaworthy would be if this one instance of operational negligence on the part of the stevedore operating the winch could be said to constitute unseaworthiness.

The uncertainty and confusion in this area of the law has resulted from the Supreme Court's per curiam opinion in *Mascuilli v. United States*, 387 U.S. 237, decided on May 22, 1967. In its per curiam opinion, the Supreme Court granted certiorari and reversed the judgment of the Third Circuit, citing only two cases: *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423 (1959), and *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944).

The district court had held in *Mascuilli*, among other things, that the stevedores had only been instantaneously negligent in handling seaworthy equipment; therefore, the vessel could not be said to be unseaworthy. *Mascuilli v. United States*, D.C.E.D.Pa. 1965, 241 F.Supp. 354, aff'd per curiam, 358 F.2d 133.

The question, then, is whether *Mascuilli* abolished the defense of operational negligence in an action for unseaworthiness. If so, the plaintiff-appellee in the instant case may recover, but if not, recovery is clearly barred since there is no other evidence which would support a finding of unseaworthiness.

Prior to *Mascuilli*, this Court had held in *Antoine* and *Robichaux*,[1] that operational negligence at the moment of injury did not render the vessel unseaworthy. *Mascuilli* raised serious doubt as to the continuing vitality of this holding. That doubt, at least for this Circuit, has been dispelled. "Instant unseaworthiness" resulting from "operational negligence" of the stevedoring contractor is not a basis for recovery by an injured longshoreman. The question is so resolved by our recent decision in *Grigsby, etc. v. Coastal Marine Service of Texas, Inc., et al.*, 5 Cir. 1969, ____ F.2d ____ [No. 22451, May 1, 1969]. See Part VI, pages 35-45, slip opinion.[2]

The district court, upon remand, is directed to grant appellants' motion for summary judgment.

REVERSED AND REMANDED.

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[1] *Antoine v. Lake Charles Stevedores, Inc.*, 5 Cir. 1967, 376 F.2d 443, cert. denied, 389 U.S. 869, 88 S.Ct. 145, 19 L.Ed.2d 146; *Robichaux v. Kerr McGee Oil Indus., Inc.*, 5 Cir. 1967, 376 F.2d 447.

[2] See also *Tim v. American President Lines*, 9 Cir. 1969, ____ F.2d ____ [No. 22,395, March 18, 1969].

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APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22451

HAZEL JEAN GRIGSBY, WIDOW OF JOHN D. GRIGSBY, INDIVIDUALLY AND AS NATURAL TUTRIX OF HER MINOR CHILDREN, JAVAN K. GRIGSBY AND JENNIFER ANN GRIGSBY,

Appellee,

versus

COASTAL MARINE SERVICE OF TEXAS, INC., MARYLAND CASUALTY COMPANY, GULF SALT CARRIERS, INC., F. E. AIPLE d/b/a AIPLE TOWING COMPANY, FIDELITY & CASUALTY COMPANY OF NEW YORK, WELDERS SUPPLY COMPANY OF LAKE CHARLES, LOUISIANA,

Appellants.

OLIN MATHIESON CHEMICAL CORPORATION,

Intervenor-Appellee.

Appeals from the United States District Court for the Western District of Louisiana

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(May 1, 1969)

Before BROWN, Chief Judge, BURGER* and WISDOM, Circuit Judges

PART IV
PAGES - (35-45) SLIP OPINION
INCORPORATED BY REFERENCE

VI.

UNSEAWORTHINESS OF THE BARGE

The Shipowner, Aiple, sharply attacks the finding of the Trial Judge that the Barge was unseaworthy. As discussed in Part V it also contends that even though the Barge was unseaworthy, no right of recovery exists under the Louisiana death statute for non-negligent unseaworthiness.

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[23]See The Tungus v. Skovgaard, 1959, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524, 1959 A.M.C. 813; Holly v. S.S. Manford Stonefield, 4 Cir., 1959, 269 F.2d 317; Union Carbide Corp. v. Goett, 4 Cir. 1960, 278 F.2d 319, 1960 A.M.C. 1119; Maryland ex rel Smith v. A/S Nabella, D.Md., 1959, 176 F.Supp. 668, 1959 A.M.C. 2196; Vassallo v. Nederl-Amerik Stoomv Matts Holland, Tex., 1961, 344 S.W.2d 421. See also Weed v. Bilbrey, Fla. Ct. App., 1967, 201 So.2d 771, 774 n. 2, *reversed*, Fla., 1968, 215 So. 2d 749.

[24]Florida is a surprising exception, since its survival statute speaks in terms of "libels in rem", a maritime, not local, concept. See Moragne v. State Marine Lines, Inc., Fla., 1968, 211 So.2d 161. Article 2315 does not contain an in rem provision. However, Louisiana statutes allow proceedings in rem against an "offending vessel" "where any injury, loss or damage is caused or occasioned within the territorial jurisdiction of the State of Louisiana to the person or property of any person by carelessness, neglect or want of skill in navigation, direction or management of any vessel. . . ." La. R. S. 34:802, 803 (1950).

The findings of the District Court on unseaworthiness may be briefly paraphrased. On the arrival of the Barge at the Olin dock, she was listing noticeably to starboard because of the unusual and abnormal accumulation of water in the No. 2 starboard wing tank. This tank is designed to provide buoyancy to the Barge and should, therefore, contain no water. Inspection revealed that there was 2'3" of water in this tank. In this condition the Barge was not reasonably fit to carry the cargo of sodium nitrate which she had undertaken to transport. Moreover, the hatch cover wings to the No. 2 starboard wing tank were corroded and sealed tightly. The wing tank contained some carbon monoxide and was oxygen deficient to the extent that those who entered lost consciousness. No inspection of the tank had been had since December 9, 1961. On this, the Court found the Barge to have been unseaworthy.

On this finding of unseaworthiness, it was, of course, a perfectly natural and inescapable conclusion that since this condition caused Grigsby to lose consciousness and drown in the accumulation of water in the No. 2 starboard wing tank, the unseaworthiness was a proximate cause of his injuries and death.

This matter of unseaworthiness of the Barge poses somewhat unusual problems. In our analysis, however, we are aided if we dispose of positions at each extreme which are simply untenable with respect to the peculiar circumstances of this case. It is well to reemphasize here that the duty of seaworthiness arises because Grigsby had the vicarious status of a seaman — either as one engaged in life salvage or, as a

corollary, one engaged in the Good Samaritan rescue of Sonnier and Morgan, each of whom admittedly were doing repair work, the traditional work of seamen to thus become vicarious seamen themselves. The point of significance is, therefore, that it was the presence of the water in the wing tank and the consequent list to the Barge which was the sole occasion for the three of them to be aboard the Barge at the time and under the circumstances presented. We may assume that with this list the Barge was unseaworthy *vis a vis* the cargo and the shipper of cargo. But there is no warranty that the vessel is seaworthy with respect to the unseaworthy condition which is directly responsible for bringing aboard the persons claiming the benefit of the warranty. We agree with the Second Circuit in *McDaniel v. The M/S Lisholt*, 2 Cir., 1960, 282 F.2d 816, 1961 A.M.C. 25:

> "We need pause only briefly with libelant's assertion that he was entitled to a warranty of seaworthiness. The short answer is that the contention was disposed of by this Court's prior decision, since we do not read the Supreme Court's opinion as disapproving our ruling on this issue. As we there stated, 'There can be no duty to furnish a seaworthy ship to a fireman who was on the vessel knowing it to be unseaworthy, and was on board because of its unseaworthiness.' 2 Cir., 257 F.2d 538, 540. See also West v. United States, 361 U.S. 118, 80 S.Ct. 189, 4 L.Ed.2d 161; Filipek v. Moore-McCormack Lines, Inc., 2 Cir., 258 F.2d 734, certiorari denied 359 U.S. 927, 79 S.Ct.

605, 3 L.Ed.2d 629; Bruszewski v. Isthmian S.S. Co., 3 Cir., 163 F.2d 720, certiorari denied 333 U.S. 828, 68 S.Ct. 451, 92 L.Ed. 1113."

The same may be said, we think, with respect to another extreme — the oxygen deficiency of the tank (or the presence of carbon monoxide gas presumably resulting also from the natural process of oxidation). A wing tank is to supply buoyancy. It was supplying buoyancy although it also produced a list. The wing tank is not present or designed for the purpose of safely carrying men. A wing tank is expected to be kept closed. As a compartment intended to be tightly closed and sealed for long periods of time, it is expected that there will likely be an oxygen deficiency which itself makes it dangerous for tank entry unless precautions are taken.

Consequently, if confined precisely to the particular reasons given by the Trial Court we would have much doubt that they would sustain the holding of unseaworthiness.

On the other hand, the Shipowner's effort to press the literalism of *West v. United States*, 1959, 361 U.S. 118, 80 S.Ct. 189, 4 L.Ed.2d 161, 1960 A.M.C. 15, must fail here just as it did recently in *Lusich v. Bloomfield S.S. Co.*, 5 Cir., 1966, 355 F.2d 770, 1966 A.M.C. 191. It would, to be sure, be a nice day for shipowners if under a bareboat charter of a manned vessel or a charter of almost any kind of an unmanned vessel, the owner could absolve itself of all of the traditional obligations of furnishing a seaworthy vessel merely be-

cause the owner was not in the physical possession and control of the craft and, on the contrary, the possession and control was in the hands of the charterer. Obviously, of course, the absence of possession and control may well insulate the shipowner from a liability in personam in the absence of conduct which somehow implicates the remote owner in the deficiency.[35] But on principles of *in rem* liability, or concepts akin to it, there seems to be no more reason for the physical absence of an owner's representative universally to insulate the vessel from accountability for personal injuries occasioned by unseaworthiness than there is to absolve the vessel from *in rem* liability for, say, other types of maritime torts including collision, even though the vessel, on this hypothesis, is wholly in the control of a demise charterer and, worse, being conned by a compulsory pilot.[36]

Thus, in *West*, had the vessel been in the regular course of operation under a demise charter from the United States (her owner), to a private company as bareboat charterer, and had the claimant sustained

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[35] There are, of course, circumstances in which *in rem* liability will also be lacking for want of requisite control. See Moye v. Sioux City & New Orleans Barge Lines, Inc., 5 Cir., 1968, ——— F.2d ——— [No. 23018, Oct. 9, 1968].

[36] Griffin, *Collision*, §244, at 553 (1949):

"Thus a vessel is liable *in rem* for collision, although she is under demise charter and the master and crew are therefore the charterer's servants * * *."; 1 Benedict, *Admiralty*, §132, at 362-63 nn. 63, 64 (1940); Homer Ramsdell Transp. Co. v. Compagnie Generale Transatlantique, 1900, 182 U.S. 406, 21 S.Ct. 831, 45 L.Ed. 1155; The China, 1868, 74 U.S. (7 Wall.) 53, 19 L.Ed. 67. *Cf.* Reed v. The Yaka, 1963, 373 U.S. 410, ——— S.Ct. ———, ——— L.Ed.2d ———, 1963 A.M.C. 1373.

his injuries from a condition other than that being repaired, we have no doubt that liability at least on principles *in rem* would have existed and would have been enforceable against the government under the Public Vessels Act, 46 U.S.C.A. §§781-90. We, therefore, decline, with deference to pursue the literalism of the Fourth Circuit in *Union Carbide Corp. v. Goette*, 4 Cir., 1960, 278 F.2d 319, 1960 A.M.C. 1119, *cert. denied*, 364 U.S. 826, 81 S.Ct. 64, 5 L.Ed.2d 55.[37] The principle of *West* does not therefore extricate the Shipowner as it hopefully urges.

As the facts which give rise to this inference are virtually without dispute and rest almost altogether on other fact findings having the buoyancy of F.R.Civ. P. 52(a), we think it appropriate for us to affirm the finding of unseaworthiness although on a different ground. The unseaworthiness here is not the antecedent condition of the Morton Salt Barge #2, either upon arrival

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[37] Following trial after remand from the Supreme Court, see note 13 *supra*.

We do not put in the same class the decision of Judge Ainsworth, then District Judge, in Hurst v. Point Landing, Inc., E.D. La., 1962, 212 F. Supp. 160, 162. Although the opinion discusses the absence of control, the opinion and decision, however, correctly analyze *West* in terms of the reason for the vessel undergoing repair and the presence of the injured person aboard at the time of the occurrence. "There is no doubt that the Barge was unseaworthy; this was the reason for its being at the Avondale wet dock, that is, for the removal of the condition which caused it to become unseaworthy —the defective hatch cover which was not fully closed. It would be manifestly unfair to penalize a shipowner for performing his duty and taking the necessary steps to make his ship seaworthy. * * * The primary reason for libelant being aboard the Barge was the performance of his duties to Avondale * * *."

at Olin's dock, or at the time Coastal's men started to perform their engagement. Here the unseaworthiness is confined narrowly to that point of time commencing with Sonnier's undertaking to go into the wing tank. The tank entry was done with the full knowledge of Coastal's representatives. Indeed, it was done to effectuate Coastal's work — the discharge by portable pump of the water accumulated in the wing tank. Obviously the tank was not safe for men at that time, either actually or under applicable safety regulations (see notes 52, 53, *infra*). Even though the tank was not meant to be safe for persons, once it became necessary to enter it, the service contractor had the obligation not to perform its work in a way which would make the vessel unseaworthy, i.e., unfit for men. Here a man was about to enter the wing tank. The tank was then not reasonably fit for the presence of men. It was not reasonably fit for the presence of men because the contractor had failed and continued to fail to take those steps which were required to make it reasonably safe — *i.e.*, test, ventilate or equip workers with the safety appliances needed (see note 53 *infra*).

To this extent, it was the action of the contractor which created the unseaworthy condition. But at least since *Alaska S.S. Co. v. Petterson*, 1954, 347 U.S. 396, 73 S.Ct. 601, 96 L.Ed. 499, 1954 A.M.C. 860, this has been enough.[38]

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[38]See Gutierrez v. Waterman S.S. Co., 1963, 373 U.S. 206, 83 S.Ct. 1185, 10 L.Ed.2d 297, 1963 A.M.C. 1649; Weyerhaeuser S.S. Co. v. Nacirema Co., 1958, 355 U.S. 563, 78 S.Ct. 438, 2 L.Ed.2d 491, 1957 A.M.C. 645. See also, Italia Societa v. Oregon Stevedoring Co., 1964, 376 U.S. 315, 84 S.Ct. 748, 11 L.Ed.2d 732, 1964 A.M.C. 1075; Ferrante v. Swedish American Lines, 3 Cir.,

But so typical of this Tinker-to-Evers-to-Chance[39] struggle there is an instinctive reflex by each side. Thus, the Shipowner, conceding with no enthusiasm that an independent contractor can be the instrument by which the vessel becomes unseaworthy to thereby launch unlimited liability against the ship (and hence her owner) asserts that there must be a time, sequential limitation, otherwise the contractor's conduct creates "instant unseaworthiness" as to which our subsequent *Antoine* and *Robichaux*[40] cases deny vessel liability. With like simplicity, the argument of the claimants merely anticipated in point of time that which can now be characterized in terms of *Mascuilli*[41] even though it has come out since the decision below. The *Mascuilli* theory is also one of extravagantly simple absolutes. It is the direct one that *Mascuilli*

1964, 331 F.2d 571, 1964 A.M.C. 2268, *cert. denied*, 379 U.S. 801, 85 S.Ct. 10, 13 L.Ed.2d 20; Thompson v. Calmar S.S. Corp., 3 Cir., 1964, 331 F.2d 657, 1964 A.M.C. 2249, *cert. denied*, 379 U.S. 913, 85 S.Ct. 259, 13 L.Ed.2d 184; Blassingill v. Waterman S.S. Corp., 9 Cir., 1964, 336 F.2d 367, 1964 A.M.C. 1932: Bue, Admiralty Law in the Fifth Circuit—A Compendium for Practitioners: I, 4 Hous. L. Rev. 350, 397-99 (1966).

[39]United States v. Seckinger, 5 Cir., 1969, —— F.2d ——, —— [No. 23432, Feb. 28, 1969, slip opinion at 14].

[40]Antoine v. Lake Charles Stevedores, Inc., 5 Cir., 1967, 376 F.2d 443, *cert. denied*, 389 U.S. 869, 88 S.Ct. 145, 19 L.Ed.2d 146; Robichaux v. Kerr McGee Oil Indus., Inc., 5 Cir., 1967, 376 F.2d 447. To these should be added Taylor v. S.S. Helen Lykes, 5 Cir., 1968, —— F.2d —— [No. 25101, Oct. 31, 1968] affirming E.D. La., 1967, 268 F. Supp. 932, involving a Yaka seaman-longshoreman's action against his employer's vessel. See also Note, Operational Negligence of Longshoreman Occurring at Moment of Injury to Co-Worker Does Not Render Vessel Unseaworthy, 5 Hous. L. Rev. 371 (1967). *Cf.* Mitchell v. Trawler Racer, Inc., 1960, 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941, 1960 A.M.C. 1503.

[41]Mascuilli v. United States, 1967, 387 U.S. 237, 87 S.Ct. 1705, 18 L.Ed.2d 743, 1967 A.M.C. 1702.

now means to affirm that "instant unseaworthiness" resulting from the "operational negligence" of the contractor at the very moment of injury subjects the ship to the absolute unseaworthiness liability.

We think neither of these extremes is warranted here. We agree, of course, that in *Antoine* and *Robichaux*, this Court rejected categorically the notion of "instant unseaworthiness". But that is of no help to the Shipowner here since the contractor's negligence extended over an appreciable period of time. On the other hand, the claimants' efforts to circumvent altogether a time factor on the basis of *Mascuilli* are equally wanting.[42]

With deference to our brothers in the Fourth Circuit we decline to follow their holding in *Satchell*[43] and that written for the panel by Judge Sobeloff in *Venable*[44] that *Mascuilli* rejects out of hand that so-called "operational negligence" defense to thereby impose absolute liability for the resulting "instant unseaworthiness".[45]

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[42]This question is presented directly in several cases, perhaps obliquely in some, now pending before other panels of this Court. See Luckenbach Overseas Corp. v. Usner, No. 25344; Wilson v. Societa Italiana de Armamento, No. 25890; Duncan v. Transeastern Shipping Corp., No. 25672; Patterson v. Humble Oil & Refining Co., No. 26365.

[43]Satchell v. Svenska Ostasiatiska Kompaniet, 4 Cir., 1967, 385 F.2d 76.

[44]Venable v. A/S Det Forenede Dampskibsselskab, 4 Cir., 1968, 399 F.2d 347.

[45]The unrevealing per curiam opinion of the full court on rehearing en banc, 4 Cir., 1968, 399 F.2d 355, may be the enigma wrapped in mystery. Although the order as published does not so reflect, direct communication with the Clerk of that Court confirms that the order was signed by the full Court.

This means that we part company at the same time with our distinguished brothers of the Second Circuit if — and the if can be a big one — the concurring opinion of Judge Leonard P. Moore on rehearing in *Candiano* and *Alexander*[46] speaks for the Court in the views which indicate that close analysis of intra-circuit undulations, aberrations and enigmas, of his own and other (including the Fifth) Circuits had led him to substantial second thoughts about "instant unseaworthiness" and *Mascuilli*.

A number of beacons chart the course in this direction. Foremost, perhaps, is the unlikelihood of the Supreme Court undertaking to make such a sweeping choice in the heavy seas of conflict by such an unilluminating pronouncement. Next, examining the only cases cited — *Mahnich*[47] and *Crumady*[48] — likewise reveals no intrinsic evidence of any such sweeping purpose. As for *Mahnich*, it was an early forerunner of what few could then expect would shortly be let loose by *Sieracki*[49] that merely held that it was the ship or her equipment being used, not the negligence of crew members in selecting the faulty from the good, which determined unseaworthiness. As for *Crumady*, its citation was an indication of precision, not generali-

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[46]Candiano v. Moore-McCormack Lines, Inc., 2 Cir., 1967, 386 F.2d 444, on petition for rehearing of 382 F.2d 961, 1967 A.M.C. 2312; Alexander v. Bethlehem Steel Corp., 2 Cir., 1967, 382 F.2d 963, 1967 A.M.C. 2324.

[47]Mahnich v. Southern S.S. Co., 1944, 321 U.S. 96, 64 S.Ct. 96, 88 L.Ed. 561, 1944 A.M.C. 1.

[48]Crumady v. The Joachim Hendrik Fisser, 1959, 358 U.S. 423, 79 S.Ct. 445, 3 L.Ed.2d 413, 1959 A.M.C. 580.

[49]Seas Shipping Co. v. Sieracki, 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, 1946 A.M.C. 698.

zation since in both *Crumady* and *Mascuilli* the injury resulted from the failure of the safety circuit breaker devices to work properly either from deficiencies or prior improper setting.

Of course nothing we say about what the Supreme Court said or thought it said can add much to what was said or what it will say it said. How we have divined it may be rejected by an expansive analysis of why the cryptic deliverance of *Mascuilli* was the message from Delphi in the words of perhaps latter-day spokesmen, that under the law "the very finding of operational negligence is a simultaneous finding of unseaworthiness — [since the] — alchemy is instantaneous."[30]

The result is that we adhere to *Antoine* and *Robichaux*, but faithful to them we find the ample facts on which to predicate unseaworthiness resulting from the negligence by the contractor in the performance of its work.

The decree against the Shipowner was therefore correct.

APPENDIX D

ORDER GRANTING INTERLOCUTORY APPEAL

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Misc. No. 856

LUCKENBACH OVERSEAS CORPORATION and ISTHMIAN LINES, INC.,

Petitioners,

versus

JOSEPH CHARLES USNER,

Respondent

On Application for Leave to Appeal from an Interlocutory Order

Before BROWN, Chief Judge, COLEMAN and SIMPSON, Circuit Judges.

BY THE COURT:

Leave to appeal from the interlocutory order of the United States District Court for the Eastern District of Louisiana, entered on August 11, 1967, in this cause be, and the same is hereby GRANTED.

(ORIGINAL FILED - October 12, 1967)

APPENDIX E

ORDER AMENDING ORDER OF AUGUST 11, 1967

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

Joseph Charles Usner	CIVIL ACTION
versus	No. 15531
LUCKENBACH STEAMSHIP CO., INC., ET AL	SECTION F

In view of the fact that the order rendered herein on August 11, 1967 denying the motion of Luckenbach Overseas Corporation and Isthmian Lines, Inc. for summary judgment involves a controlling question of law, to wit, the validity of the doctrine of operational negligence as a defense,

IT IS ORDERED that the order rendered herein on August 11, 1967 be amended to show that there exists a controlling question of law, to wit, the validity of the doctrine of operational negligence as a defense in this cause and as to which defense there is a substantial ground for difference of opinion and accordingly, an immediate appeal may materially advance the ultimate termination of the litigation.

New Orleans, Louisiana, August 30, 1967.

(Signed) LANSING L. MITCHELL
UNITED STATES DISTRICT JUDGE

APPENDIX F

ORDER GRANTING MOTION OF LUCKENBACH and ISTHMIAN LINES FOR AMENDED ORDER OF AUGUST 11, 1967

MINUTE ENTRY:
AUGUST 30, 1967
MITCHELL, J.

JOSEPH CHARLES USNER — SECTION "F"

versus — NO. 15531

LUCKENBACH STEAMSHIP COMPANY, INC., et al — CIVIL ACTION

This cause came on this day for hearing on motion of Luckenbach Overseas Corporation and Isthmian Lines, Inc., Defendants, for rehearing or, in the alternative, to amend order.

PRESENT: Evangeline M. Vavrick,
Attorney for Plaintiff

George B. Matthews, Esq.
Attorney for Union Barge Line Corp.

M. D. Yager, Esq.
Attorney for Luckenbach Overseas Corp.
Isthmian Lines

IT IS ORDERED BY THE COURT that motion of Luckenbach Overseas Corporation and Isthmian Lines, Inc., Defendants, for rehearing or, in the alternative, to amend order, be, and the same is hereby, GRANTED, insofar as the Order of August 11, 1967 be amended.

APPENDIX G

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

MINUTE ENTRY
MITCHELL, J.
AUGUST 11, 1967

JOSEPH CHARLES USNER	CIVIL ACTION
VERSUS	NO. 15531
LUCKENBACH STEAMSHIP CO., INC., ET AL	SECTION F

This cause came on for hearing on another day on motion of the defendant, Luckenbach Overseas Corporation, erroneously designated Luckenbach Steamship Co., Inc., and Isthmian Lines, Inc. for a summary judgment in their favor, dismissing the complaint against them.

PRESENT:

Evangeline M. Vavrick
Attorney for plaintiff

M. D. Yager, Esq.
Attorney for defendants

IT IS ORDERED that the motion of the defendants, Luckenbach Overseas Corporation and Isthmian Lines, Inc., is denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. 675

JOSEPH CHARLES USNER

VS.

LUCKENBACH OVERSEAS CORPORATION AND ISTHMIAN LINES, INC.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

This response to the application for the writ of certiorari is made pursuant to the direction of the Court. For the reasons hereinafter set forth, respondent submits that the writ should be refused, but earnestly and with respect urges, if the Court is of the opinion that the position of petitioner has merit, that such opinion be finalized only after the writ has been granted and oral argument has been heard.

Counsel is advised that the principle of law here involved is of transcendent importance to the maritime industry and that *amici curiae* briefs may be expected

from several sources. The "cryptic deliverance"[1] of the Court in *Mascuilli*[2] has undoubtedly led to confusion in the lower courts,[3] and another *per curiam* reversal contemporaneously with the granting of the writ will serve only to compound the confusion now existing in the minds of the judges of the various Districts and Circuits.

Petitioner here seeks a change in the rules of the game; and although it is our submission that no change should be made, with the utmost respect we urge that if Your Honors decide the case in favor of the position taken by petitioner, your decision be clear-cut, so that the industry will know where it stands.

OPINIONS BELOW

Since the filing of the application, the opinion below has been reported officially in 413 F. 2d. 984. Likewise, the opinion in *Grigsby et al v. Coastal Marine Service of Texas, Inc., et al* is reported officially in 412 F. 2d. 1011.

QUESTIONS PRESENTED

A single question is presented for review on the record herein. That question is posed by the Court below as follows:

> "The sole issue is whether a ship is rendered unseaworthy as a result of the instantaneous negligence of stevedores, this negligence resulting in the injury of another stevedore, when all the equipment and appurtenances aboard the

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[1] Brown, J. in Grigsby v. Coastal Marine Service of Texas, Inc. 412 F.2d 1011, 1033 (5th Cir. 1969); see also Moore, J. in Tarabocchia v. Zim Israel Navigation Co., Ltd. 417 F. 2d 476, 477 (2nd Cir. 1969).

[2] Mascuilli v. United States, 387 U. S. 237, 87 S. Ct. 1705 (1967).

[3] See pp. 11-15, infra.

ship are admittedly in a seaworthy condition."[4]

The foregoing question, we submit, is considerably more narrow than that presented as Question (2) in the petition. Questions (1) and (3), purported raised below, are subsidiary thereto and do not necessarily follow therefrom.

ARGUMENT

As the Court of Appeals pointed out in the course of its opinion, the facts in this case are undisputed[5] and generally are set forth properly in the application for the writ. Although it may be possible to reconcile the decisions of the various Circuits on their narrow facts, it is submitted that counsel would be less than frank if it were argued that there is unanimity among the Circuits in the general area of negligence and unseaworthiness. *Candiano*[6] and *Alexander*[7] in the Second Circuit and possibly *Venable*[8] in the Fourth Circuit cannot be reconciled in theory with *Tim*[9] in the Ninth Circuit and the Fifth Circuit opinions, including the opinion below in the instant case.

The conflict between the Circuits, however, is not in the original thought processes of the Judges in every day contact with these types of cases and who decide them in the courts of first instance, but in the appreciation of the lower courts of the meaning of the decision of Your

[4] Opinion below, 413 F. 2d 984, 985.

[5] The case was tried on a stipulation of fact which is summarized in the opinion below, 413 F. 2d 984, 985. It is believed that the summary is accurate in all respects.

[6] Candiano v. Moore-McCormack Lines, Inc. 382 F. 2d 961 rehearing den. 386 F. 2d 444 (2nd Cir. 1967).

[7] Alexander v. Bethlehem Steel Corp., 382 F. 2d 963 (2nd Cir. 1967).

[8] Venable v. A/S Det Forenede Dampskibsselskab, 399 F. 2d 347 (4th Cir. 1968).

[9] Tim v. American President Lines, Ltd., 409 F. 2d 385 (9th Cir. 1969).

Honors in *Mascuilli*. The stage for that decision was set by a long series of cases wherein the courts generally, and this Court in particular, accorded to the Longshoremen's and Harbor Workers' Compensation Act an extremely liberal interpretation in favor of an injured maritime worker. The language of that Act, in the context of this case, has not been amended by the Congress since the date of its original enactment, although its penumbra of case law has changed so materially as to make the entire area unrecognizable. It had been thought that *Sieracki*,[10] *Ryan*,[11] and *Yaka*[12] completed the circle which seemingly had an outer perimeter bounded only by the ingenuity of plaintiffs' counsel. Yet all of the foregoing has taken place in the face of the provision of the law describing the statutory remedy of a longshoreman against his employer as "exclusive".

Although counsel knows of no accurate source of statistics which are available to show the number of Federally compensable injuries which result in a suit against the shipowner wherein the stevedore-employer in fact foots the bill, counsel's personal experience, at least in the New Orleans area from which this case arises, is that the "circular liability" spawned by *Ryan* and *Yaka* comes to rest on the stevedore contractor in the vast majority of such cases. It is believed that the heavy dockets of the District Courts in the Ports of the country are conclusive proof of the extraordinary increase of litigation in this field directly attributable to that "circular liability", which, we submit, was never legislated by Congress and

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[10] Seas Shipping Co. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872 (1946).

[11] Ryan Stevedoring Co. v. Pan Atlantic SS Corp., 350 U. S. 124, 76 S. Ct.232 (1956).

[12] Reed v. SS *Yaka*, 373 U.S. 410, 83 S. Ct. 1349 (1963).

which foists liability for the "bonus recovery"[13] of the injured longshoreman on his employer in the face of a schedule of benefits for specific injuries which has been reviewed on at least two occasions by the Congress and materially increased on each review.[14]

To compound the unfortunate situation in which the stevedore contractor finds itself today, the rule now seems to be that in addition to making good any judgment which might be rendered against a shipowner by virtue of the application of the doctrine that the stevedore has failed to carry out his contract in a workmanlike fashion or that the conduct of the stevedore "brought into play" the pre-existing unseaworthiness of the ship, the stevedore contractor must also pay the expenses and attorney's fees of the shipowner who is proceeded against by an injured longshoreman in a baseless suit which the shipowner is successful in defending.[15]

It may be that Your Honors will say that the rules referred to are now so firmly imbedded in our jurisprudence as to preclude further argument on their propriety, but it is submitted that the instant case presents an additional liability theory far over and beyond any heretofore approved by this Court. We respectfully urge that the door of open end liability on the shipowner/stevedore not be closed so as to eliminate the single remaining ground

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[13] Cf. Frankfurter, J., dissenting in Sieracki, supra, n. 10.

[14] The original 1927 Act providing for a maximum weekly payment for death of $52.50 was amended in 1956 to increase the maximum to $81 per week and was again amended in 1961 to increase the rate to the present $105 maximum. The disability compensation, originally fixed at $35 per week was raised to $54 in 1956 and to $70 in 1961. Other liberalizations in benefits were consistent with the foregoing. The benefits of the Federal Act are far greater than those accorded a workman under any state law.

[15] Cf. Massa v. C. A. Venezuelan Navigacion, 332 F. 2d 779 (2nd Cir. 1964; Arista Cia. De Vapores, S. A. v. Howard Terminal, 372 F. 2d 152 (9th Cir. 1967).

upon which a personal injury claim of a longshoreman may be defended, thereby requiring the shipowner/stevedore to do exactly what this Court and many other courts have said need not be done: a shipowner has never been required to furnish an accident-free ship and the courts have consistently recognized that it would be improper to place such an obligation on him.

It is to be noted that we do not plead that the stevedore contractor should escape liability. The Longshoremen's and Harbor Workers' Compensation Act forecloses any such plea. The stevedoring industry, like any other industry, and regardless of fault, must pay an injured employee the amount of compensation found to be due — carrying the burden of an unlimited medical expense and a life-long compensation payment if the circumstances justify such an award.

Against the foregoing background, an attempt is made in the instant case to have Your Honors hold that the instantaneous negligence of a longshoreman resulting in the injury of a fellow worker renders an otherwise admittedly seaworthy ship unseaworthy, and may serve as the basis for a recovery for which, as surely as night follows day, the stevedore contractor will be required to pay.

The illustration cited by Judge Bryan in his dissent in *Venable*[16] is singularly apposite and may be applied to a lunch pail as well as to a hammer, wrench or other tool. Petitioner would have this Court hold that a vessel becomes unseaworthy if a longshoreman walking along the deck with his dinner pail accidently drops the pail on

[16] Supra, n. 8, at 354.

the foot of a fellow worker walking beside him and causes a broken toe. Applying the "but for" rule of elementary tort law, an answer might be made in the light of present conditions that the fellow worker should have been furnished with safety shoes which would have precluded injury. But what answer may be made if the pail were dropped on the fellow worker's hand rather than on his foot? We submit that such negligence, although leading to the payment of compensation under the Act, cannot in theory or in fact create an unseaworthy condition.

We should point out that we are not here concerned with an unseaworthy condition created by the negligence of a longshoreman,[17] or with defective gear brought on board by the stevedoring contractor,[18] or with an improper method of loading,[19] or with an insufficient number of men being assigned to perform a job.[20] We are here concerned solely with an attempt to extend the doctrine of damages being awarded for unseaworthiness caused by the instantaneous negligence of a longshoreman where no faulty "condition" preexisted the injury.

The contention may be made that the doctrine of recovery for negligence is subsumed by the doctrine of recovery for unseaworthiness. That approach, however, does not meet the question here presented and the basic fallacy of such a position can easily be pointed out by an analysis

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[17] Crumady v. The *Joachim Hendrik Fisser*, 358 U. S. 423, 79 S. Ct. 445 (1959).

[18] Alaska SS Co. v. Petterson, 347 U. S. 396, 74 S. Ct. 601 (1951).

[19] Morales v. City of Galveston, 275 F. 2d 191 (5th Cir.), vacated and remanded 364 U. S. 295, 81 S. Ct. 107 (1960); on remand, 291 F. 2d 97, aff'd. 370 U. S. 165, 82 S. Ct. 1226 (1962).

[20] Waldron v. Moore-McCormack Lines, Inc., 386 U.S. 724, 87 S. Ct. 1410 (1967).

of the holding of the Court in *Trawler Racer*,[21] which decision is generally recognized as the keystone on which the modern concept of unseaworthiness has been built by this Court. Your Honors there rejected the contention that transitory unseaworthiness is limited by concepts of common law negligence, but you have nevertheless presupposed the existence of a faulty or unseaworthy condition, although such condition was temporary in nature, saying:

> "There is no suggestion in any of the decisions that the duty is less onerous with respect to an *unseaworthy condition* arising after the vessel leaves her home port, or that the duty is any less with respect to an *unseaworthy condition which may be only temporary*. Of particular relevance here is Alaska Steamship Co. v. Petterson, supra. In that case the Court affirmed a judgment holding the shipowner liable for injuries caused by defective equipment temporarily brought on board by an independent contractor over which the owner had on control. That decision is thus specific authority for the proposition that the shipowner's actual or constructive knowledge of the *unseaworthy condition* is not essential to his liability. That decision also effectively disposes of the suggestion that liability for a *temporary unseaworthy condition* is different from the liability that attaches when the *condition* is permament.
>
> "There is ample room for argument, in the light of history, as to how the law of unseaworthiness should have or could have developed.

[21] Mitchell v. Trawler Racer, Inc., 362 U. S. 539, 80 S. Ct. 926 (1960).

> Such theories might be made to fill a volume of logic. *But, in view of the decisions in this Court over the last 15 years, we can find no room for argument as to what the law is. What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence. To hold otherwise now would be to erase more than just a page of history.*
>
> "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service. Boudoin v. Lykes Bros. S. S. Co., 348 U.S. 336, 75 S. Ct. 382, 99 L. Ed. 354." (Italics ours).

Nowhere in any decision that Your Honors have announced has there been a suggestion that the basic prerequisite of the *existence* of an unseaworthy condition as a foundation of liability has been abandoned. In *Morales*, *supra*, this Court held that an unsafe condition in cargo being loaded aboard a ship did not *per se* render the vessel unseaworthy, although it is acknowledged, of course, that the dissent there did indicate that liability should be imposed because the vessel was not reasonably fit in view of the shipowner's prior knowledge of the possibility that the fumigation of the grain could cause personal injury to those working in proximity to it. The condition, however, existed at all times, so that even if the dissent there were to become the law of tomorrow the holding

could quite easily be reconciled with today's jurisprudence.

Likewise, in *Waldron, supra*, the insufficiency of the manual assistance afforded to the injured plaintiff constituted the basis for the claim of unseaworthiness, but again Your Honors had before you an existing condition which gave rise to the injury. In each of the cases which have heretofore been described as constituting the successive high water marks in the determination of unseaworthiness, the existence of some condition will be found on which the Court predicated liability.

The foregoing, of course, is consonant with the concept that unseaworthiness is condition and that negligence is causation. The one does not mean the other. Two completely separate and different doctrines are involved, and we respectfully submit that those who claim that negligence is subsumed by unseaworthiness in this field simply fail to recognize the difference between the two.

Despite the suggestion by Judge Moore that the word "'unseaworthiness' may have become a term of art wholly unrelated to reality",[22] it can hardly be believed that so well defined a word, in use for so many years, can so radically change its meaning. No social condition dictates the necessity for such a change. No suggestion can be made that a change is necessary because of a concept, newly advanced, that the word has always been improperly defined.

On the contrary, the evolution of the law over the past two or three decades has left no room for equivocation: "seaworthiness" connotes condition, not causation. The

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[22] Moore, J., in Tarabocchia, supra, n. 1, at 473.

divorce from concepts of negligence must remain finalized.

Although counsel must frankly state to the Court that the decision in *Mascuilli* does not generally seem to be understood by the bench or the bar, one does not go to Delphi for an interpretation of the Oracle's words. No one can be more familiar with the meaning of a decision than the Court which rendered it, and it would serve no useful purpose to present any argument to Your Honors as to the proper interpretation of that decision. We address ourselves, therefore, not to the meaning of the *Mascuilli per curiam*, but to the proper answer to the question presented by the application for the writ herein.

It is probable that the doctrine of operational negligence causing actionable unseaworthiness stems, in the Second Circuit at least, from the decision of that Court in *Grillea*.[23] In that case, the fact that a longshoreman had misplaced a hatch cover so as to cause it to be in a position to fall created a condition of unseaworthiness which resulted in an accident. The fact that the cover was otherwise perfect was of no moment: its misplacement created the unseaworthy condition, and even though the physical act of misplacing the cover might stem from negligence, the vessel was nevertheless unseaworthy at the time of the accident.

"Instantaneous negligence", accordingly, was not a factor in that case any more than it would be in any other case where unworkmanlike conduct in a loading or discharging operation aboard ship creates a condition which causes an injury to a longshoreman. *Candiano* likewise involved unseaworthiness. Hooks had been inserted in holes

[23] Grillea v. United States, 232 F. 2d 919 (2nd Cir. 1956).

in each end of a beam being lowered into a hold, but one of the hooks became dislodged and the beam fell, causing the injury. The fact that the hook had been negligently attached to the beam caused the ship to become unseaworthy, but again the condition of unseaworthiness was encountered by the injured longshoreman. On rehearing, Judge Moore expounded at length on his theory of the concept of operational negligence causing unseaworthiness. He pointed out that the time element is irrelevant, for practically no loading or unloading operation could be carried on in such a manner as to permit it to be said at any time that a phase of the operation had ceased and another phase had started so as to cause the negligence to be defined as instantaneous. His review of the case law points up the difficulty in which a trial court finds itself in attempting to give an instruction to a jury in a case involving operational negligence, which is one of the issues that must be faced in any attempt to reconcile doctrine with practicalities.

As Judge Moore points out, the clarity of the definition of seaworthiness given in the *Trawler Racer* "has been considerably dimmed by appellate decisions". A vessel which is reasonably fit or reasonably suitable for its intended use and service is no longer seaworthy by the definition (in this context) accorded that word by the lower courts. The definition has completely lost its significance, at least in the Second Circuit, by the confusion of unseaworthiness with negligence through what Judge Moore describes as "instantaneous alchemy".[24]

Following *Candiano* came *Alexander* (decided on the same day), where the claimed unseaworthiness stemmed

[24] Moore, J., concurring in Candiano, supra, n. 6, 386 F. 2d 444, 449.

from an improper placing of dunnage as well as from an incompetent crane operator whose negligence displaced the dunnage.

Next in the line of cases decided in the Second Circuit would seem to be *Cleary*,[25] which involved the negligently improper spotting of a boom coupled with negligent operation of the winches. The condition (improper spotting) pre-existed the negligence of the winch operator and the decision is consonant with the others in this line of cases.

The last case which counsel has been able to find in the Second Circuit following this line seems to be *Tarabocchia*,[26] where the Court held the ship liable for an accident caused by the apparent negligent handling of a sling or winch by the stevedore company's employees, causing a platform attached to the wharf to fall and injure the plaintiff. Judge Moore sat on that panel and pointed out that the Second Circuit had

> "committed itself to the proposition that operational negligence must be equated with unseaworthiness of the ship. We have thus crossed our Rubicon and if we are to retreat from our position, it must be over a bridge constructed by the Supreme Court when, as and if it may choose to resolve the apparent conflict between the Circuits. To hold that a negligent act of an employee of a stevedore can instantaneously turn a proud seaworthy ship into an unseaworthy floating object may seem to defy common sense but "unseaworthiness' may have become a term of art wholly unrelated to reality. Possibly in a semantic way we are dealing with what is 'essentially a species of liability without fault'."[27]

[25] Cleary v. United States Lines Co., 411 F. 2d 1009 (2nd. Cir. 1969).
[26] Supra, n. 1.
[27] 417 F. 2d 476, 478.

It is not hard to discern from these four opinions that the Second Circuit would never have gone so far as to hold that operational negligence constitutes unseaworthiness were it not for the fact that it interpreted *Mascuilli* as requiring that result. *Mascuilli* indeed is the forerunner of the conflict in theory between the Circuits, for despite the majority opinion in *Venable*, the ruling on the petition for rehearing shows that the Court *en banc* was of the opinion that although operational negligence might cause unseaworthiness, every such instance did not create an unseaworthy condition so as to give rise to liability.

This is made clear by the subsequent affirmance by the Fourth Circuit of Judge Harvey's memorandum opinion on the appeal taken from a motion maintaining a summary judgment in favor of the defendant in *Benton*.[28] The court below remarked that it had seen no case where an injury sustained by a wrench negligently thrown into a hatch could be classified as one caused by unseaworthiness in that there had been no condition created. Unseaworthiness, it was held, contemplates condition.

In the Ninth Circuit, the rule is the same as in the Fifth: the distinction is maintained and instantaneous negligence is held not to create unseaworthiness. In *Tim*,[29] the only complaint was the negligence of the crane operator. A long line of cases cited in the course of the opinion indicates that the Ninth Circuit has consistently refused any doctrine that unseaworthiness arises out of instantaneous negligence, the Court there pointing out

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[28] Benton v. United States Lines, Inc., 297 F. Supp. 87 (D. Md. 1968), aff'd. 408 F. 2d 378 (4th Cir. 1969).

[29] Supra, n. 9.

that a defective condition must exist for the Court to hold a vessel unseaworthy.

The decisions of the Fifth Circuit, including the decision below, remain to be discussed. That Court apparently first decided that operational negligence does not constitute unseaworthiness in *Antoine*.[30] The *Antoine* doctrine was affirmed in *Grigsby*, and reaffirmed in *Duncan*[31] as well as in the instant case.

A tabulation of the opinions in the foregoing cases may therefore be said to reflect the reaction of a substantial majority of the Judges on the Fourth, Fifth and Ninth Circuits, and at least a large number of the Judges on the Second Circuit: the score is impressive in rejecting the concept that the existence of a pre-accident condition is not a requisite to the finding of liability based on unseaworthiness. *Absent* the *Mascuilli per curiam*, we dare say there would be a complete unanimity among all Circuits in holding that instantaneous negligence, standing alone, does not give rise to an action for damages based on unseaworthiness.

If counsel were permitted to go further in this projection, we would be inclined to state that a great majority of the judges whose dockets require them to hear most of the "circular liability" cases would stop far short of *Sieracki*, *Ryan* and *Yaka*. Most courts, we submit, would gladly return to the days when a ship, to be labelled "unseaworthy", would have to have something inherently wrong with her before she could be called not reasonably fit for cargo or men. Then, spilling coffee beans on a wharf as a result of slack bags, rigging a

[30] Antoine v. Lake Charles Stevedores, 376 F. 2d 443 (5th Cir. 1967).
[31] Duncan v. Transeastern Shipping Corp., 413 F. 2d 1023 (5th Cir. 1969).

hatch tent with new wire rope which proved defective and broke, bringing on board ship a latently defective snatch block, or any other similar type of "default" in the performance of a stevedore's duties would visit liability on him alone. That liability would be exclusive of any other. It would be based on the unambiguous provisions of the Longshoremen's and Harbor Workers' Compensation Act as enacted by the Congress, and not on any concept of the unseaworthiness of a ship which requires the shipowner to act as a buffer between the longshoreman and his employer. It must be recognized that rightly or wrongly, no system has yet been devised by the ingenuity of man which guarantees that an accident will not occur. If such a guarantee is exacted from the shipowner, he is required to do exactly what Your Honors have said is not necessary: insure an accident-free vessel.

It is submitted that at this moment in our socio-legal development, an injured maritime worker, be he longshoreman, harbor worker or seaman, probably has more rights than any other worker in industry. No social or legal need can be shown invoking policy reasons in order to "impose new financial burdens on stevedoring companies in plain violation of the policy Congress adopted in the Longshoremen's and Harbor Workers' Compensation Act."[32] On the contrary, the need is to "give effect to the law as Congress has written it",[33] and get away from characterizing the theory and rationale of judicial opinions as "instantaneous alchemy"[34] and "judicial legerdemain".[35]

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[32] Black, J., dissenting in Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315, 326, 84 S.Ct. 748 (1964)

[33] Harlan, J., dissenting in Grimes v. Raymond Concrete Pile Co., 356 U.S. 252, 255, 78 S.Ct. 687 (1958)

[34] Judge Moore, supra, n.24

[35] Stewart, J., dissenting, in Calbeck v. Travelers Insurance Co., 370 U.S. 114, 132, 82 S.Ct. 1196 (1962)

CONCLUSION

We respectfully urge that if Your Honors see fit to grant the petition herein, you do so for the purpose of bringing the Second Circuit into line with the Fourth, Fifth and the Ninth, and that the Court affirm the decision below and hold that instantaneous negligence is not tantamount to unseaworthiness, a word which has always been recognized to refer to a condition pre-existing the incident giving rise to the claim.

Respectfully submitted,

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February 6, 1970

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FILED
MAY 13 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. ~~915~~ 47

JOSEPH CHARLES USNER

Petitioner

versus

LUCKENBACH OVERSEAS CORPORATION and ISTHMIAN LINES, INC.

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF THE PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969

NO. 675

JOSEPH CHARLES USNER

Petitioner

versus

LUCKENBACH OVERSEAS CORPORATION and ISTHMIAN LINES, INC.

Respondent

BRIEF ON BEHALF OF THE PETITIONER JOSEPH CHARLES USNER

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 413 F. 2d 984. The opinion of the Court of Appeals for the Fifth Circuit in *Grigsby, et al. v. Coastal Marine Service of Texas, Inc.. et al.*, incorporated in the Usner opinion by reference is reported in 412 F. 2d 1011.

JURISDICTION

The jurisdiction of this court is invoked pursuant to Title 28 Section 1254 (1) United States Code. The judgment of the Court of Appeals for the Fifth Circuit in *Luckenbach Overseas Corporation and Isthmian Lines, Inc. v. Joseph Charles Usner* was entered on July 3, 1969. Petition for the writ was timely filed, within 90 days from July 3, 1969, the date of the judgment.

QUESTIONS PRESENTED

(1) Did *Mascuilli v. the United States*, 387 U.S. 237, 87 S. Ct. 1705, abolish the defense of operational negligence in an action based on unseaworthiness?

(2) Does operational negligence at the moment of injury render the vessel unseaworthy?

(3) Has the Supreme Court rejected the distinction between operational negligence and unseaworthiness?

STATEMENT OF THE CASE

The essential facts of the case are not in dispute and present an incidence of operational negligence at the moment of injury.

On September 28, 1964, T. Smith & Sons, Inc., an independent contract stevedore was engaged in unloading cargo consisting of bundles of steel rods, approximately 50 feet in length, from a barge and loading the cargo into the No. 3 hatch of the S/S Edgar F. Luckenbach. The barge was moored along side the vessel; the port and starboard booms at the No. 3 hatch were being used to transfer the cargo from the barge to the vessel. Slings secured to booms, were being used to transport the bundles of rods from the barge into the vessel. The Stevedore's employees were using the port winch and boom at the No. 2 hatch to aid in the operation by "breaking out" the bundles preparatory to lifting them from the barge. Their function was simply to lift each bundle temporarily, so that slings could be placed on both ends of the rods. Once the slings were secured, the cargo gear at the No. 3 hatch was used to lift the bundle out of the barge and into the vessel.

On the day the petitioner was injured, he was working on the barge, securing the slings attached to the fall of the "breakout boom" around the cargo. The operation was conducted in this manner and without incident both prior to and subsequent to petitioner's accident. At approximately 2:30 p.m., the winch operator, operating the No. 2 port winch, lowered the breakout slings just above petitioner's head and beyond his reach. Petitioner motioned to the flagman, then standing on the deck of the vessel, to direct the winch operator to lower the sling; the flagman in turn signaled the winch operator. The winch operator lowered the breakout sling too quickly and too far. The breakout gear struck petitioner causing him to fall into the barge and sustain serious and permanent injuries.

On April 27, 1965, petitioner filed a suit against the respondent claiming benefits pursuant to the General Maritime Law. On July 31, 1967, the respondent filed a motion for summary judgment alleging that there was no genuine issue as to any material facts and asserting that on the basis of discovery depositions and affidavits all ship's gear functioned properly and that if the accident was caused by negligence, that negligence could only have been the instantaneous negligence of the longshoremen, which negligence did not render the vessel unseaworthy.

The motion for summary judgment was opposed by petitioner asserting that operational negligence as a defense had been obliterated by the Supreme Court of the United States in its per curiam in *Mascuilli v. the United States*, 387 U.S. 237, 87 S. Ct. 1705. Respondent's motion for summary judgment was denied.

Respondent then filed a motion for rehearing or in the alternative for leave to take an interlocutory appeal pursuant to Title 28 of the United States Code, Section 1292 (b).

On August 30, 1967, respondent was granted leave to file for interlocutory appeal for the reason that the motion for summary judgment involved a controlling question of law, to wit, "the validity of the doctrine of operational negligence as a defense to which there existed substantial ground for difference of opinion and for which an immediate appeal would materially advance the termination of the litigation."

On October 12, 1967, the respondents were granted leave to appeal from the interlocutory order by the United States Court of Appeals for the Fifth Circuit. The matter was argued on May 24, 1968, and on July 3, 1969, the United States Court of Appeals for the Fifth Circuit rendered a judgment remanding the matter and directing the District Court to enter the summary judgment.

ARGUMENT

The question of law presented herein is, did the United States Supreme Court in *Mascuilli v. the United States*, 387 U.S. 237, 87 S. Ct. 1705, abolish the time test which heretofore distinguished unseaworthiness from operational negligence at least within the circuits? Or stated another way — did the Supreme Court in *Mascuilli* abolish the defense of operational negligence or did it simply reaffirm its position in *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944) and *Crumady v. The J. H. Fisser*, 358 U.S. 423 (1959) neither of which establish a time test.

It is submitted that *Mascuilli*, as do *Mahnich* and *Crumady*, stands for the proposition that the misuse of proper equipment by a longshoreman resulting in injury to a co-worker renders the vessel unseaworthy without regard to an interval of time between the negligent act and the resulting condition of unseaworthiness. Neither *Mahnich* nor *Crumady* allude to a time interval but to a condition which exists when and where the work is to be done.

Counsel for petitioner submits that the Supreme Court in *Mascuilli* reaffirmed *Mahnich* and *Crumady*.

The time test, or the ripening of a condition of unseaworthiness over the passage of time, is a creature of the appellate courts. The Supreme Court has consistently held a vessel to be unseaworthy when an inquiry as to whether or not the condition complained of made the vessel unsafe and dangerous for the work at hand has been answered affirmatively.

Mascuilli is a classic example of operational negligence resulting in instant unseaworthiness. On an otherwise seaworthy ship, a tag line tender was killed during a loading operation aboard a government vessel by the negligence of his fellow employees, in their failure to operate the winches in unison, resulting in the creation of a tightline condition which caused a heavy shackle to part, recoil and inflict the mortal wounds, all in an instant.

The decedent's wife sued the vessel owner alleging the ship's first officer was negligent and the vessel was unseaworthy. This district court held that the vessel was at all times in a seaworthy condition, and that the

accident was caused by the failure of the longshoremen to comply with proper loading procedures. The trial court's summation of the cause of the accident was as follows:

> "In summary, the Court finds that the vessel and all its equipment was in a seaworthy condition at all times, and remained so throughout the entire loading operations. The accident was caused solely by the negligent operation of the stevedoring crew using seaworthy equipment in such a manner as to cause the accident to occur so instantaneously that the Third Officer was unable to warn anyone or to prevent its happening." *Mascuilli v. United States*, 241 F Supp. 354, (E.D. Pa. 1965).

The Court of Appeals for the Third Circuit affirmed per curiam, and held that the findings of fact and conclusions of law by the trial court were not clearly erroneous:

> "This case is before us for the second time. In our judgment, upon consideration of the whole record, including, *inter alia* appellant's thorough statement of her view of the question involved, the findings of fact by the Trial Court, that the vessel and its equipment were in a seaworthy condition at all times throughout the loading operation and that the accident was caused solely by the negligent operation of the stevedoring crew as stated in finding of fact #35, were not clearly erroneous." *Mascuilli v. United States*, 358 F. 2d 133 (3rd Cir. 1967).

This Honorable Court granted *certiorari* and summarily reversed citing *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S. Ct. 455 (1944) and *Crumady v. The*

Joachim Hendrick Fisser 358 U.S. 423, 79 S. Ct. 445 (1959).

The Petitioner's Brief for Certiorari in *Mascuilli* posed three questions. As this Honorable Court reversed the two lower courts, it must have answered at least one of these questions in the affirmative.

Analysis of which of the three questions was answered affirmatively has led to different conclusions and has not resolved the conflict which existed in the circuits prior to *Mascuilli*. The confusion which has plagued both bench and bar and the entire maritime industry continues.

Though this Honorable Court did not render an opinion in *Mascuilli* an examination of *Mahnich* and *Crumady* leads to the determination that the second question was answered affirmatively.

Briefly the questions posed by the petitioner in *Mascuilli* were as follows:

(1) Did a prior unseaworthy condition come into play by the tightline condition?

(2) Did the negligent handling of proper equipment by the longshoremen create a dangerous condition rendering the vessel unseaworthy?

(3) Was the vessel unseaworthy because the longshoremen were "not equal in disposition and seamanship to the ordinary men in the calling," as was found in *Boudoin v. Lykes Brothers*, 348 U.S. 336 (1955)?

It is this writer's opinion that this Honorable Court's

affirmative answer to the second question solely prompted the reversal.

With respect to the first question, the trial court in effect distinguished *Crumady* on facts. In both *Mascuilli* and *Crumady* the automatic cut-off devices on the winches were set in excess of safety requirements. However, in *Mascuilli*, the two winches involved in the tightline condition could not possibly trip; the after port winch was in paying out position #1 and the forward starboard winch was in neutral. In neither of these positions would the safety devices on the winches trip. There was uncontroverted expert testimony by defendant's witnesses to the effect that when a tightline condition occurs involving a winch in the paying-out position and another winch in the neutral position, there is no known safety device in marine architecture and engineering that would or could have prevented the type of accident which actually occurred. (*Mascuilli*, 241 F. Supp. 354, F.F. #33 at p. 360-361). This in effect distinguishes *Crumady* since in that case the winch was paying in and the safety device could have tripped before the boom snapped had the cut-off device been properly set. The excess setting in *Mascuilli* albeit improper, and perhaps even a defective condition, had no causal connection with the accident since there was no known safety device which could have prevented it. The after starboard winch could not have prevented nor measured the pull along the tightline. There was no safety device to be adjusted for winches in those positions; therefore, when the shackle broke, it could only have been caused by the negligent use of proper equipment — *the petitioner's second question.*

The third question posed by petitioner must be an-

swered in the negative for several reasons. Had this Court intended to reverse on this point, it would have cited *Boudoin* as controlling, which it did not do.

Also, liability under the *Boudoin* decision is a question of degree, 348 U.S. 336, 339-340 (1955). It would seem clear that a single act of negligence by otherwise competent longshoremen would not require the conclusion that they were unequal in disposition and seamanship to the ordinary men of the calling.

Since this Court did not reverse on the basis of petitioner's first or third questions, it must have reversed on the basis of the second question, alone, namely that the negligent handling of proper equipment by long shoremen rendered the vessel operationally unseaworthy instantly.

The trial court in *Mascuilli* concluded as a matter of fact that the vessel was seaworthy at all times, and that the accident was caused solely by the negligent operation of the stevedoring crew using proper equipment improperly. The conclusion of law reached was that on the basis of the facts found there could be no recovery for complainant since the shipowner was not obliged to furnish an accident-free ship.

The Appellant Court in *per curiam* affirmed the decision of the trial court. Why then did this Court summarily reverse a conclusion of law of the two lower courts that negligent handling of proper equipment does not render the vessel unseaworthy?

This answer is to be found in *Mahnich* and *Crumady*. In *Crumady v. The J. H. Fisser*, 358 U.S. 423 (1959),

this court quoted approvingly from *Grillea v. United States* (2 Cir. 1956): 232 F.2d 919

> "It was held in Grillea v. U.S. . . . that stevedores themselves could render a ship *pro tanto* unseaworthy and make the vessel owner liable for injuries to one of them . . . *We need not go so far as to sustain the District Court here.*" (Emphasis added). (Id. at p. 427).

Just three weeks prior to its decision in *Mascuilli*, this court further clarified the language in *Crumady*:

> "And in Crumady . . . we further clarified the extent of unseaworthiness liability by holding that, even though the equipment furnished for the particular task is itself safe and sufficient, its misuse by the crew renders the vessel unseaworthy." *Waldron v. Moore-McCormack, Inc.*, 386 U.S. 724, (1967)

When *Mascuilli* was presented to this court, it simultaneously granted *certiorari* and reversed on the basis of what was already the law as stated in *Crumady*. *Mahnich* was cited for the proposition that the court could review the concurrent findings of seaworthiness by the two lower courts below, where such findings contained an erroneous conclusion of law. This court was obviously of the opinion that the misuse of proper equipment rendered the vessel unseaworthy as a matter of law, and the failure of the two courts below to so hold was reversible error.

Doctrinal trends of this Supreme Court since *Mahnich* 321 U.S. 96 (1944) have shown an ever increasing liberalization of the unseaworthiness doctrine.

The Supreme Court has guarded the doctrine of seaworthiness and has in each instance wherein an attempt has been devised to encroach upon it or limit its applicability tolerated no departure from the concept of a species of liability without fault imposing upon the shipowner an absolute, non-delegable duty to all who come within the range of the doctrine's humanitarian policy. A brief review of the pertinent jurisprudence aptly demonstrates this Court's position that it is a concept divorced of negligence, an absolute non-delegable duty, due when and where the work is to be done.

Mahnich v. Southern S.S. Co., 321 U.S. 96, 64 S. Ct. 455 (1944) Unseaworthiness exists even if sound gear and equipment were aboard and available, though not used.

Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S. Ct. 872 (1946) The duty to provide a seaworthy vessel applies when the vessel is in port as well as at sea.

Sea Shipping Co. v. Sieracki, 328 U.S. 85, 66 S. Ct. 872 (1946)

Pope and Talbott v. Hawn, 346 U.S. 406, 73 S. Ct. 1129 (1953) The duty of providing a seaworthy vessel is owed to shoreside personnel doing work traditionally done by seaman — "substitute seaman".

Alaska Steamship Co. v. Pettersen, 347 U.S. 396, 74 S.Ct. 272 (1954) The duty is owed by the shipowner though control has been relinquished and ship's gear is not involved.

Boudoin v. Lykes Brothers S.S. Co., 348 U.S. 336, 75 S. Ct. 382 (1955) The doctrine is not solely limited to

structural or material features of the ship but extends and is applicable to personnel also.

Crumady v. The J. H. Fisser, 358 U.S. 423, 79 S. Ct. 445 (1959) The doctrine embraces improper use of seaworthy equipment.

Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 80 S. Ct. 926 (1960) The doctrine embraces "transitory conditions".

Gutierrez v. Waterman S.S. Co., 373 U.S. 206, 83 S. Ct. 1185 (1962) The doctrine is applicable to shoreside injuries caused by the vessel's unseaworthiness as well as to injuries sustained aboard ship as a result of the vessel's unseaworthiness.

Reed v. The Yaka, 375 U.S. 872, 83 S. Ct. 1349, 429 (1963) The duty is owed to a longshoreman even if his employer is also the time charterer of the vessel.

Albanese v. Maats, 382 U.S. 283, 86 S. Ct. (1965) Actual knowledge of the dangerous condition is not required for liability for unseaworthiness to attach.

Jackson v. Lykes Brothers S.S. Co., 386 U.S. 731, 87 S. Ct. 1419 The duty is owed the longshoreman even if his employer is also the owner of the ship.

Waldron v. Moore-McCormack, 87 S. Ct. 1410, 386 U.S. 724 The duty is owed and the shipowner cannot escape liability because men rather than machines or physical equipment is used to perform ship's work.

The pertinent consideration has always been the exist-

ence of the unseaworthy condition, not the method of its creation.

Judge Hays in affirming recovery for the plaintiff in an alleged "operational negligence" case, *Skibinski v. Waterman Steamship Company*, 360 F 2d 539, 2 Cir. 1966 stated:

> "In defining unseaworthiness we are not concerned with the conduct or process by which fitness is changed to unfitness. Our focus is upon the resulting condition of the ship."

The condition which comes into play when unsafe procedures and methods are used by longshoremen while performing their duties with otherwise seaworthy equipment is unseaworthiness. The act of negligence which creates the condition, if it results in immediate injury, is no less unseaworthiness. The condition which results is an unsafe place in which to work or a situation wherein the vessel and its appurtenances are not reasonably safe for their intended use at the time and place where the work is to be done. The end result of a longshoreman lowering a boom, negligently striking a fellow worker and that of a boom collapsing because of some structural defect is the same at the site where the boom inflicts an injury — unseaworthiness and an unsafe place in which to work.

Virtually all cases of unseaworthiness other than those resulting from structural failure are cases in which operational negligence, though not instantaneous, has resulted in an unseaworthy condition.

Mahnich v. Southern S.S. Co., 321 U. S. 96 (1944) Use of improper rope when proper was available.

Crumady v. Joachim Hendrik Fisser, 358 U.S. 423 (1959)

> Rendering safe equipment unsafe and unseaworthy by the manner in which it was used.

The Circuits have had considerable difficulty in determining when operational negligence ends and unseaworthiness begins. The distinction is untenable — a distinction without a difference.

In *Radovich v. Cunard Steamship Co.*, 364 F. 2d 1949, 2 Cir. (1966) it was stated:

> "A position that is impossible to do so (differentiate between operational negligence and an unseaworthy condition) with fairness and reason, in fact poses the question whether the distinction should not be dispensed with altogether."

The blending of the two concepts into one was recently recognized by the United States Supreme Court through Mr. Justice White speaking for the minority in the 5-4 decision in *Waldron v. Moore-McCormack Lines, Inc.*

> "While it is true that unseaworthiness is legally independent of negligence . . . it cannot be denied that in many cases unseaworthiness and negligence overlap . . . *I think the claim of negligence was identical with the claim of unseaworthiness.*" (Emphasis added).

CONCLUSION

It is respectfully submitted that the distinction between operational negligence and unseaworthiness is a distinction without a difference. It is further submitted that this Honorable Court did, in *Mascuilli*, abolish the

defense of operational negligence for the reason that operational negligence at the moment of injury does render the vessel unseaworthy. For the foregoing reasons the judgment of the United States Court of Appeals for the Fifth Circuit remanding this matter for entry of Summary Judgment should be reversed.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 47

JOSEPH CHARLES USNER,

Petitioner,

versus

LUCKENBACH OVERSEAS CORPORATION and ISTHMIAN LINES, INC.,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS

INTRODUCTION

This case presents a single, clear-cut issue: Does the instantaneous negligence of a longshoreman which is the sole and proximate cause of an injury sustained by a fellow worker give rise to a claim for damages against the vessel on which the men are working on some theory that the vessel, otherwise in every respect seaworthy in fact, has in that instant become unseaworthy? The Court of Appeals for the Fifth Circuit has answered "No". Your Honors are solicited by the petition for certiorari to reverse and hold "Yes".

Petitioner, an employee of an independent stevedore, brought this suit in the Eastern District of Louisiana

against Luckenbach Overseas Corporation and Isthmian Lines, Inc., alleging that he sustained an injury to his hip while handling cargo from the S/S *Edgar F. Luckenbach*. The record indicates that when petitioner was preparing to sling a lift, he motioned to the flagman to signal the winch operator to lower the sling a bit further. The winch operator did so, but lowered it too far. The sling struck the petitioner, injuring him. The petitioner, the flagman, and the winch operator were all fellow employees of T. Smith & Son, Inc., the independent stevedoring company handling the vessel. The Court of Appeals for the Fifth Circuit characterized the situation as one involving simple negligence saying:

> "Neither before nor after the accident was any trouble experienced with the winch, booms, slings, or any other equipment; nor is there any contention that the winches were operated in a systematically negligent manner that would constitute unseaworthiness. The only way in which the vessel could be said to be unseaworthy would be if this one instance of operational negligence on the part of the stevedore operating the winch could be said to constitute unseaworthiness."[1]

Both of the parties and both the trial court and the appellate court agreed that the affidavits introduced by respondents in support of a motion for summary judgment filed by them showed there to be no genuine issue of fact presented for decision. Respondents' motion was denied, but on motion for rehearing, the District Judge certified that there was a substantial ground for a difference of opinion on the legal question involved, and that

[1] Opinion below, A. 100.

an immediate appeal might materially advance the ultimate termination of the litigation under 28 U.S.C. 1292(b). The Court of Appeals allowed the appeal from the interlocutory order and took jurisdiction of the case.[2]

Although the District Judge believed the case to be governed by the decision of Your Honors in *Mascuilli*,[3] the Court of Appeals took the opposite position on the interpretation of that opinion and followed its prior decisions to the effect that simple operational negligence at the moment of injury did not cause a vessel to be unseaworthy. Accordingly, the decision below was reversed with instructions to enter judgment for defendants on the motion for summary judgment. Your Honors granted certiorari on the petition of plaintiff.

SUMMARY OF ARGUMENT

It is respondents' position that the instantaneous negligence of a longshoreman which causes injury to a fellow longshoreman does not give rise to a claim for recovery against the shipowner on the grounds of unseaworthiness. The existence of an unseaworthy condition is a pre-requisite to such liability. By definition, "unseaworthiness" connotes *condition* rather than *causation*. The present uncertainty in the jurisprudence stems from a misinterpretation by some lower courts of the holding of this Court in the *Mascuilli* case, and represents their appreciation of that decision rather than their independently reached conclusions.

Respondents submit that the shipowner is not the insurer of the safety of a longshoreman on board a vessel,

[2] A. 92 et seq.
[3] Mascuilli v. United States, 387 U. S. 237, 87 S. Ct. 1705 (1967).

and there is no economic, social or logical justification for an extension of the existing rules to cover such a situation.

Accordingly, the decision of the court below (to the effect that the instant negligence of a longshoreman did not constitute instant unseaworthiness so as to create a cause of action in favor of an injured co-worker) should be affirmed.

ARGUMENT

In the words of the Court of Appeals for the Fifth Circuit:

> "The sole issue is whether a ship is rendered unseaworthy as a result of the instantaneous negligence of stevedores, this negligence resulting in the injury of another stevedore, when all the equipment and appurtenances aboard the ship are admittedly in a seaworthy condition."[4]

It is our submission that the decision below resolving this issue in the negative should be affirmed. Petitioner complicates this hearing unduly by urging that three questions are presented by the petition, rather than the one question to which we have adverted. We submit that those questions numbered (1) and (3) purportedly presented by the record are subsidiary to and are subsumed by question (2): An answer to that question "Does operational negligence at the moment of injury render the vessel unseaworthy?" automatically renders unnecessary any separation of the case into subsidiary issues.

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[4] Opinion below, A. 100.

The Court is here squarely presented for the first time with what is called "instantaneous unseaworthiness", a kind of amorphous state which rather defies explanation in historical concepts or in the limits of judicial precedents of this Court. A new and perfectly built and operated ship, because of the negligent act of a longshoreman, becomes "unseaworthy" in an instant for an instant, during which split second interval a fellow worker is hurt. The injured man, we submit, has a single remedy—that provided him under the Harbor Workers' Act. He cannot and should not be accorded a recovery against the ship.

Unseaworthiness has always connoted condition, just as negligence has always connoted causation. It is, of course, recognized that as a matter of logic, the unseaworthy condition usually will have been caused by some human act or omission, tested according to some predetermined standard. If a longshoreman steps on a hatch board which is too short and falls into the hold of a ship, he may bring an action against the ship based upon the unseaworthiness, which was initiated, of course, by someone improperly placing the hatch board in a dangerous position. It is impossible, therefore, completely to divorce condition from causation if one goes back in the chain of events far enough to attempt to find out the reason why the unseaworthiness exists, but exist it must.

The doctrine that a recovery should be granted to a longshoreman for injuries caused by the unseaworthiness of the vessel on which he was working stems directly from *Sieracki*,[5] decided in 1946 with three justices dissenting. In that case, Your Honors will recall that Justice Rutledge had great difficulty in characterizing the scope and basis

[5] Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S. Ct. 872 (1946).

of liability. After having found that a seaman was helpless to protect himself against improper conditions which might exist on board ship, he held that the same rule should be applied to those who historically did the work of seamen, including the work of loading or discharging cargo. He classified the shipowner's liability for unseaworthiness as:

> "essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. (Citations omitted.) It is a form of absolute duty owing to all within the range of its humanitarian policy."[6]

Even though the language of Justice Rutledge is all inclusive, no one has ever gone so far as to say that the vessel owner is the insurer of the safety of every worker who boards the vessel. On the contrary, every court that has had an opportunity to express itself on the question has firmly and unequivocally held that a shipowner is not an insurer of the safety of men working aboard the ship. A shipowner's liability still stems from unseaworthiness or negligence, and in the absence of a finding that one or the other was the cause of injury, judgments necessarily go against the personal injury claimant.

What, then, is meant by unseaworthiness? The courts have progressed in the field of personal relations into new areas where humanitarian doctrines and the complexities of our existing twentieth century social system

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[6] 328 U. S. at 94-95; 66 S. Ct. at 877.

have been reflected in the thinking of the judiciary as well as in the philosophy of our lawmakers and our leaders of industry. The result has been an ever-broadening liability of the shipowner to an extent not dreamed of three or four decades ago. A ship may now become actionably unseaworthy while at sea as well as in foreign ports, even though it departed on its voyage in perfect condition. The dynamic concept of unseaworthiness over the years has moved to where it now includes transitory unseaworthiness, and, as has been stated in now classic language, the origins of the doctrine are no longer important in circumscribing its reach in the field of personal injuries. Nonetheless, condition is always the predicate of liability. That lesson comes from the *Trawler Racer*, where Justice Stewart said:

> "There is ample room for argument, in the light of history, as to how the law of unseaworthiness should have or could have developed. Such theories might be made to fill a volume of logic. But, in view of the decisions in this Court over the last 15 years, we can find no room for argument as to what the law is. What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence. To hold otherwise now would be to erase more than just a page of history.
>
> "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a

> ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service."[7]

Nowhere has counsel been able to find any suggestion that the basic pre-requisite of the existence of an unseaworthy condition as a foundation for liability has been abandoned by the courts. Even though the condition is transitory and even though it is not known to the shipowner, it is nevertheless an existing condition upon which liability is based. In the instant case, petitioner would have the Court do exactly what has been held improper: tear up the pages of history and hold that condition is not a pre-requisite to a finding of unseaworthiness. It is impossible, we submit, for there to be any justification for such a change or extension of the doctrine. Quite apart from the fact that no economic or social need exists for a more liberal or humanitarian approach to compensation for a disabling injury sustained by a longshoreman,[8] the recovery which the injured party seeks in this case is a recovery over and above that accorded to him under the compensation law enacted for his benefit. Indeed, there is sought here an enlargement of the circumstances under which there is paid that extraordinary bonus which is granted to this type of employee alone of all of the workers on the American industrial scene.

It is probable that the doctrine of operational negligence causing actionable unseaworthiness stems, in the

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[7] Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550; 80 S. Ct. 926, 933 (1960).

[8] Injuries sustained by a longshoreman are compensable under the Fed-Longshoremen's and Harbor Workers' Compensation Act at a rate substantially in excess of that provided for in most state compensation acts. 3 Larsen, Workmen's Compensation, Tables, 503-65 (1969).

Second Circuit at least, from the rather early decision of that Court in *Grillea.*[9] In that case, the fact that a longshoreman had misplaced a hatch cover so as to cause it to be in a dangerous position created a condition of unseaworthiness which resulted in an accident. The fact that the cover was otherwise perfect was of no moment: its misplacement created the unseaworthy condition, and even though the physical act of misplacing the cover might stem from negligence, the vessel was nevertheless unseaworthy at the time of the accident.

"Instantaneous negligence", accordingly, was not a factor in that case any more than it would be in any other case where unworkmanlike conduct in a loading or discharging operation aboard ship has been held to create a condition which causes an injury to a longshoreman. *Candiano*[10] likewise involved unseaworthiness. Hooks had been inserted in holes in each end of a beam being lowered into a hold, but one of the hooks became dislodged and the beam fell, causing the injury. The fact that the hook had been negligently attached to the beam caused the ship to become unseaworthy, but again the condition of unseaworthiness was encountered by the injured longshoreman.

Following *Candiano* came *Alexander*[11] (decided on the same day), where the claimed unseaworthiness stemmed from an improper placing of dunnage as well as from an incompetent crane operator whose negligence displaced the dunnage.

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[9] Grillea v. United States, 232 F.2d 919 (2nd Cir. 1956).

[10] Candiano v. Moore-McCormack Lines, Inc., 382 F. 2d 961, rehearing den. 386 F. 2d 444 (2nd Cir. 1967).

[11] Alexander v. Bethlehem Steel Corp., 382 F.2d 963 (2nd Cir. 1967).

Next in the line of cases decided in the Second Circuit would seem to be *Cleary*,[12] which involved the negligent spotting of a boom coupled with negligent operation of the winches. The condition (improper spotting) pre-existed the negligence of the winch operator and the decision is consonant with the others of this line.

Following the line is *Tarabocchia*,[13] where the Court held the ship liable for an accident caused by the negligent handling of a sling by the stevedore's employees, causing a platform to fall and injure the plaintiff. Judge Moore sat on that panel and pointed out that the Second Circuit had

> "committed itself to the proposition that operational negligence must be equated with unseaworthiness of the ship. We have thus crossed our Rubicon and if we are to retreat from our position, it must be over a bridge constructed by the Supreme Court when, as and if it may choose to resolve the apparent conflict between the Circuits. To hold that a negligent act of an employee of a stevedore can instantaneously turn a proud seaworthy ship into an unseaworthy floating object may seem to defy common sense but 'unseaworthiness' may have become a term of art wholly unrelated to reality. Possibly in a semantic way we are dealing with what is 'essentially a species of liability without fault'. (Citation omitted) But whatever be the rationalization process, if any, the trial court correctly followed our

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[12] Cleary v. United States Lines Co., 411 F. 2d 1009 (2nd Cir. 1969).

[13] Tarabocchia v. Zim Israel Navigation Co., Ltd. 417 F. 2d 476, 477 (2nd Cir. 1969).

conception of *Mascuilli* and his decision as to liability must be affirmed."[14]

It is not hard to discern from these four opinions that the Second Circuit would never have gone so far as to hold that operational negligence constitutes unseaworthiness were it not for the fact that it interpreted *Mascuilli* as requiring that result.

Mascuilli indeed is the forerunner of the conflict between the Circuits, for despite the majority opinion in *Venable*,[15] the ruling on the petition for rehearing shows that Fourth Circuit *en banc* was of the opinion that although operational negligence might cause unseaworthiness, every such instance did not create an unseaworthy condition so as to give rise to liability.

On the other hand, the Ninth[16] and the Fifth[17] Circuits have taken an exactly opposite position. (It would not appear amiss to here note that the Chief Justice, sitting as a Circuit Judge in *Grigsby*, was a member of the unanimous court deciding that case.)

If all of the opinions referred to in the Circuits were closely analyzed, another facet would become apparent:

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[14] 417 F. 2d 476, 478.

[15] Venable v. A/S Det Forenade Damp. 399 F. 2d 347 (4th Cir. 1968); but see Benton v. U. S. Lines, Inc., 297 F. Supp. 87 (D. Md. 1968), aff. 408 F. 2d 378 (4th Cir. 1969); and Lundy v. Isthmian Lines, Inc., 423 F. 2d 913 (4th Cir. 1970).

[16] Cf. Tim v. American President Lines, Ltd., 409 F. 2d 385 (9th Cir. 1969).

[17] Antoine v. Lake Charles Stevedores, Inc., 376 F. 2d 443 (5th Cir. 1967), cert. den. 389 U.S. 869, 88 S. Ct. 145; Robichaux v. Kerr McGee Oil Indus., Inc., 376 F. 2d 447 (5th Cir. 1967); Taylor v. S/S Helen Lykes, 402 F. 2d 777 (5th Cir. 1968); Grigsby v. Coastal Marine Service of Texas, Inc., 412 F. 2d 1011 (5th Cir. 1969), cert. denied ..... U. S. ....., 90 S. Ct. 612 (1970); Duncan v. Transeastern Shipping Corp., 413 F. 2d 1023 (5th Cir. 1969); Reed v. MV Foylebank, 415 F. 2d 838 (5th Cir. 1969), cert. den. —U.S.—, 90 S. Ct. 909 (1970); and the opinion below in the instant case.

the almost hopeless task faced by the district judges and trial counsel in giving and framing instructions to juries in those types of cases. Several judges of the Second Circuit, although deciding appeals in consonance with their appraisal of the jurisprudence, deplored the rationale of the entire theory, having in mind, apparently, their own experiences as District Judges.

"A paucity of consistency" is said to exist in the cases. Judges rail "against the necessity of stultifying their judicial minds by being required 'to make distasteful hair-splitting distinctions unrelated to any intelligible concepts of right and wrong' . . . and to make 'trivial, meaningless and confusing distinctions.' "[18]

In the same concurring opinion of Judge Moore from which the quotation comes, he brings home with great clarity the dilemma of the trier of fact:

> "The real difficulty in the future will arise at the trial level. If there are any facts to be determined by a jury other than assessment of damages and contributory negligence, how is the trial judge to charge? Is 'operational negligence' to be mentioned at all? When does the 'operation' commence? How momentary is a 'momentary interval'? Is 'instant negligence' to be added to 'instant unseaworthiness'? Many other similar questions undoubtedly will arise."[19]

Further examples of the pitfalls into which a trial court will fall if operational negligence is considered as unseaworthiness are illustrated in the dissent of Judge

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[18] Moore, J. concurring in Candiano, supra, (on rehearing) quoting Friendly, J. and Kaufman, C. J.
[19] 386 F. 2d at 448.

Hastie in *Thompson v. Calmar Steamship Corp.*,[20] as follows:

> "Unable to find any satisfactory rationalization for this decision or to comprehend its scope, I fear that the bar and the maritime community will find that our ruling leaves confused and doubtful the question of the ship's liability in many situations, in which it heretofore has seemed clear that no liability existed. Does this decision mean that when a pilot negligently maneuvers a ship against a bridge or a pier, the steering apparatus is unseaworthy? If a stevedore negligently allows tackle to fall to the deck injuring someone, is the gear unseaworthy? If one passenger injures another by carelessly using some sports equipment supplied by the ship, is this equipment unseaworthy? If it seems ridiculous to apply the concept of unseaworthiness to such cases as these, I think the incongruity lies not with the choice of examples but with the present decision which seems to embrace all such situations."

The concept of a vessel becoming unseaworthy because of the misuse or negligent use by a longshoreman of proper gear is, we submit, at variance with the theory of liability and with the basic reasons originally existing for granting seamen this type of remedy and extending the doctrine to apply to longshoremen. It is our submission that the rules of the game have now changed to such an extent that the original game is no longer recognizable.

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[20] 331 F. 2d 657, 663 (3rd Cir. 1964), cert. den. 379 U.S. 913, 85 S. Ct. 259.

As Judge Friendly said in his dissent in *Skibinski*,[21] echoing the dissatisfacton expressed by Judge Hastie:[22]

> "It is time to scuttle a doctrine which requires judges to make distasteful hair-splitting distinctions unrelated to any intelligible concepts of right and wrong; granted that liability for unseaworthiness does not rest on fault, it ought to rest on something more than casuistry. Indeed, I suspect we would long since have revolted against a principle which capriciously imposes liability on a thoroughly well equipped ship if we did not know that in the usual case, where the plaintiff 'seaman' is shore-based, the story will have a happy ending for the ship since liability will rest on her only for a moment and then will be transferred to the stevedoring contractor. By very definition, improper use of ship's equipment triggers the contractor's warranty of workmanlike service, *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956), the ship regularly impleads the stevedore, and there the burden falls. To me this argues for a restrictive rather than an expansive notion of unseaworthiness in these situations; courts should not strain to use the ship, innocent in every realistic sense, merely as a conduit for imposing on the negligent employer a liability to his employees differing from the absolute but limited one which Congress made exclusive by § 5 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §

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[21] Skibinski v. Waterman Steamship Corporation, 360 F. 2d 539, 543 (2nd Cir. 1966).

[22] Supra, n. 20.

905. Of course the statute did not impair an injured longshoreman's right against third parties who have wronged him, 33 U.S.C. § 933. But proper respect for what Congress was 'driving at,' see *Johnson v. United States*, 163 F. 30, 32, 18 L.R.A.,N.S., 1194 (1 Cir. 1908) (Holmes, J.) ought to lead judges away from a doctrine which so frustrates the legislative purpose by imposing a transitory liability on a third party that has turned over a thoroughly seaworthy vessel to a qualified stevedore. If the benefits under the Compensation Act are inadequate, the remedy lies in action by Congress, not in judicial legerdemain which helps one longshoreman but does nothing for another whose situation would appear similar to everyone except those lawyers and judges who have had to accustom themselves to the witty diversities of this branch of the law."

Just how far can the doctrine be carried and where can it be stopped? Is there any difference between a piece of dunnage slipping out of a draft being lowered into a hatch[23] and a beam slipping out of a sling while being lifted?[24] And what is the difference between dunnage or a beam falling from a sling and a wrench being thrown from deck to a lower hold?[25] How can such incidents make the vessel unseaworthy?

And if a stevedore makes a ship unseaworthy by bringing on board a latently defective hatch tent[26] or a defec-

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[23] Dugas v. Nippon Yusen Kaisha, 378 F. 2d 271 (5th Cir. 1967).
[24] Marshall v. Ove Skou Rederi A/S, 378 F. 2d 193 (5th Cir. 1967).
[25] Benton v. U. S. Lines, Inc., supra, n. 15.
[26] Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., Inc., 376 U.S. 315, 84 S. Ct. 748 (1964).

tive snatch block,[27] does the vessel become unseaworthy if a longshoreman carrying his tin lunch pail drops it on his fellow worker's head when the bail pulls out of its socket? If injuries caused by these events are held to be due to unseaworthiness, at what split second did the unseaworthy condition arise?

These questions are not asked in a vacuum. They are questions that arise daily in the courts of first instance, and any judge framing instructions to a jury must indeed walk a narrow line to stay within the bounds of current rulings.

Like Judge Hastie in *Calmar, supra*, we urge that unseaworthiness should signify some inherently unfit, unsound or unsafe condition in a vessel, which in fact does not become unseaworthy because of some negligence of a contractor employed to work on it, whether or not he is doing the work traditionally performed by seamen.

It is submitted in all earnestness that a longshoreman working on a ship was intended to have a remedy against his employer based on the employer-employee relationship and that no other remedy was intended by the Congress to be granted to him insofar as his employer was concerned. The advent of the *Ryan*[28] doctrine, coupled with the holding[29] that concepts of comparative negligence are not applicable in the field of a stevedore's working arrangements with a shipowner, to which has been added the elimination of the exclusive liability features of the Harbor Workers' Act, when applied to a shipowner act-

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[27] Alaska Steamship Co., Inc. v. Petterson, 347 U.S. 396, 74 S. Ct. 601 (1954).

[28] Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp., 350 U.S. 124, 76 S. Ct. 232 (1956).

[29] Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 72 S. Ct. 277 (1952).

ing as stevedore on his own ship,[30] have indeed made these waters rough seas upon which to sail. A longshoreman injured through classic unseaworthiness of a vessel, i.e., an inherent deficiency in her hull, machinery, gear or equipment, should, of course, have a right to make a third party claim against a shipowner and that right is clearly accorded to him under the Harbor Workers' Act. It is a far cry, however, to torture this statutory right into the judicially created cause of action based upon unseaworthiness "brought into play" by the employer of the injured man. For the negligence of the employer bringing this type of unseaworthiness into play, the longshoreman has his remedy under the Harbor Workers' Act solely and exclusively against his employer. We urge that he not be permitted to go further.

To attempt now to stretch the already over-extended judicially-created right to apply to a situation where a ship which is perfectly sound has become unseaworthy for a split second in a split second, after which it becomes sound again, is, we submit, unwarranted. With due trepidation, we suggest that the proper method of bringing the jurisprudence back into proper focus is to reverse the rather substantial body of law which destroys the tried and true base of liability (real unseaworthiness) and holds a shipowner for an injury, (based on an unreal definition of unseaworthiness) due for example, to beans falling from sacks during loading or some other happening on land completely foreign to the condition of the ship itself.[31]

Although counsel knows of no accurate source of

[30] Reed v. Steamship YAKA, 373 U.S. 410, 83 S. Ct. 1349 (1963); Jackson v. Lykes Bros. Steamship Co., Inc., 386 U.S. 731, 87 S. Ct. 1419 (1967).

[31] Cf. Gutierrez v. Waterman Steamship Corp., 373 U.S. 206, 83 S. Ct. 1185 (1963); Hagans v. Ellerman & Bucknall Steamship Co., Ltd., 318 F.2d 563 (3rd Cir. 1963).

statistics which are available to show the number of federally compensable injuries which result in suits against shipowners (wherein the stevedore-employer may in fact foot the bill), it is believed that the heavy dockets of the District Courts in the busy seaports of the country are conclusive proof of the extraordinary increase in litigation in this field directly attributable to this judicially created liability, which has never been legitimated by the Congress.

It may be that Your Honors will say that the general rule referred to is now so firmly imbedded in our jurisprudence as to preclude further argument on its propriety, but the instant case presents an effort to establish an additional liability, over and beyond any heretofore approved by this Court. We respectfully urge that the door of open end liability on the shipowner not be closed so as to eliminate the single remaining ground upon which a personal injury claim of a longshoreman now may be defended. If a contrary result is reached, the shipowner will have to do exactly what this Court and all other courts have said need not be done: furnish an accident-free ship. All courts have consistently recognized that it would be improper to place such an obligation on him.

We respectfully submit that phrases such as "judicial legerdemain" and "instantaneous alchemy"[32] are not lightly used by experienced sitting judges, and must mean that there is something wrong with the Court's present definition of liability and its interpretation of the Harbor

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[32] Justice Stewart in Calbeck v. Travelers Ins. Co., 370 U.S. 114, 82 S. Ct. 1196 (1962); Judge Moore in Candiano, supra, n. 10, where he also suggested that the instances to which the word unseaworthy had been applied had "advanced (or retrogressed) from the absurd to the ridiculous"; Judge Friendly in Skibinski, supra, n. 22; and Judge Brown in Grigsby, supra, n. 17.

Workers' Act. We submit that it is time for review and retrenchment, not for a further extension of an already unpopular legal concept which is intelligible to neither the courts nor the bar, and which has no basis in sociology, economics, legislative interpretation or history.

If Justice Harlan's opinion in *Moragne*[33] could be plagiarized and paraphrased, it could read in this context as follows:

> "The rule of *Sieracki* should not be regarded as a closed proposition — it rested on a most dubious foundation when announced, has become an increasingly unjustifiable anomaly as the law over the years has developed, and, in conjunction with its corollaries, *Crumady*, *Ryan*, *Yaka* and *Halcyon*, has produced litigation-spawning confusion in an area that should be easily susceptible to more workable solutions. The rule (that the warranty of seaworthiness has been breached by the actions of the stevedore in bringing defective gear or equipment aboard or by negligent use of the ship's sound equipment) has had a long opportunity to prove its acceptability, and instead has suffered severe criticism (except from labor). To supplant the present disarray in this area with a rule both more simple and more just will further, not impede, efficiency in adjudication. Finally, a judicious reconsideration of precedent cannot be as threatening to public faith in the judiciary as continued adherence to a rule unjustified in reason."

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[33] Moragne v. States Marine Lines, Inc., ... U.S. ....., 90 S. Ct. 1772 (1970).

We urge that the Court take this opportunity to look at the overall situation in which a shipowner finds himself under the present state of the law, and that Your Honors reconsider the precedents which have been established and threaten the faith of the judiciary in itself.

CONCLUSION

We respectfully submit that the Court below was right in holding that the motion for summary judgment should have been maintained and in concluding that there is no room in our jurisprudence for the rule that instantaneous negligence can create actionable instantaneous unseaworthiness. Accordingly, the judgment below should be affirmed.

Respectfully submitted,

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NO. 47

JOSEPH CHARLES DINER, *Petitioner*

Against

LUCKENBACH OVERSEAS CORPORATION AND STEAMAN LINES, INC., *Respondents*

BRIEF AS AMICUS CURIAE IN THE ABOVE ENTITLED AND NUMBERED CAUSE

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Supreme Court of the United States

October Term, 1970

NO. 47

JOSEPH CHARLES USNER, *Petitioner*

Against

LUCKENBACH OVERSEAS CORPORATION AND ISTHMIAN LINES, INC., *Respondents*

MOTION FOR LEAVE TO FILE ACCOMPANYING BRIEF AS AMICUS CURIAE IN THE ABOVE ENTITLED AND NUMBERED CAUSE

The American Trial Lawyers Association, by and through Arthur J. Mandell, of Mandell & Wright, Houston, Texas, a member of the Bar of this Court, and as a member of the Admiralty Section of the American Trial Lawyers Association, on behalf of the American Trial Lawyers Association, respectfully petitions this court for leave to file a brief amicus curiae on behalf of Petitioner herein, and if granted, for this Honorable Court to consider the argument of cases in point following this statement of interest.

INTEREST OF THE AMERICAN TRIAL LAWYERS ASSOCIATION—ADMIRALTY SECTION

The American Trial Lawyers Association is a national bar association consisting of more than twenty thousand lawyers primarily engaged in the practice of tort law. The Admiralty Section of this bar association consists of a substantial number of attorneys specializing in maritime law. Said association is vitally interested in the outcome of this case, involving as it does, the absolute and non-delegable duty to supply a seaworthy vessel no matter how and by whom the unseaworthiness causing injury was brought about. Any relaxing of such duty would severely impair the rights of this group of workers for whom the Congress and the courts have shown a genuine deep concern.[1]

It is of paramount importance to hundreds of thousands of this class of workers that the established legal principles as announced by this court remain unimpaired and undiluted by undefinable and ofttimes invisible lines destructive of the protection granted these workers, engaged as they are in the most hazardous of all industries.

The American Trial Lawyers Association has obtained and filed the written consents of counsel for all parties herein to file this brief as amicus curiae in support of Petitioner.

---

1. The House Report accompanying the 1958 Amendment to the Longshoremen's and Harbor Workers' Compensation Act points out that stevedoring is the most hazardous of all industries which report their experience to the Bureau of Labor Statistics, having an injury frequency rate of seven times that of manufacturing. (1958 U.S. Code and Cong. News, p. 3843. Section 41 of the Act [33 U.S.C.A. § 941(a)]).

For the foregoing reasons, it is respectfully prayed that this Honorable Court accept this brief amicus curiae.

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For and in behalf of the American Trial Lawyers Association
(Admiralty Section)

Supreme Court of the United States

October Term, 1970

NO. 47

JOSEPH CHARLES USNER, *Petitioner*

Against

LUCKENBACH OVERSEAS CORPORATION AND ISTHMIAN LINES, INC., *Respondents*

BRIEF AMICUS CURIAE OF AMERICAN TRIAL LAWYERS ASSOCIATION

PRELIMINARY STATEMENT

Respondent admits Petitioners' recitation of the factual posture of the case at bar. We, therefore, adopt Petitioner's statement of the facts which brought about his injuries. This amicus brief will limit its argument in support of this court's broad concept of the doctrine of unseaworthiness protecting all those engaged in the maritime industry who do work traditionally done by seamen.

Petitioner and Respondents have given their consent to the Admiralty Section of the American Trial Lawyers Association to file this amicus curiae brief. The written con-

sent of the parties have heretofore been filed with this Honorable Court.

It is the position of the American Trial Lawyers Association that this court's unbroken decisions since 1946, recognizing that longshoremen are entitled to the same statutory and traditional protection as seamen by necessity includes unseaworthiness brought about by the instantaneous negligence of a fellow longshoreman which some courts distinguish as operational negligence or instantaneous unseaworthiness.

It is respectfully submitted that the emergence of the Twentieth Century with its highly intricate machinery brought on by the technological revolution, exposes workers to many more dangers[1] compel that shadowy undistinguishable areas between momentary, transitory and/or instantaneous action creating unseaworthiness be completely eradicated, as indeed this court did in *Mascuilli v. United States,* 387 U.S. 237, 87 S.Ct. 1705 (1967). Failing to grant these workers such protection would upset the decisions of this court and in a great measure nullify their protection.

---

1. "The committee notes that human failure undoubtedly contributes to many accidents, but usually other factors are involved. The record of accident reduction where safety standards are enforced conclusively refutes the contention that such procedures are not effective. To conclude otherwise is to disregard the affirmative results of safety legislation in this country accumulated over many years." (Senate Committee on Labor and Public Welfare, 85th Congress, Second Session Report No. 1788, July 1, 1958).

And see Congressman Borden's report on the House Committee on Education and Labor, 85th Congress, Second Session, Report No. 2887, July 28, 1958.

ARGUMENT AND AUTHORITIES

This court's decisions in *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 66 S.Ct. 872 (1946); *Mahnich v. Southern S.S. Co.,* 321 U.S. 96, 64 S.Ct. 455 (1944); *Alaska Steamship Co., Inc. v. Petterson,* 347 U.S. 396, 74 S.Ct. 601 (1954); *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 74 S.Ct. 202 (1953); *Mitchell v. Trawler Racer, Inc.,* 362 U.S. 539, 80 S.Ct. 926 (1960); *Waldron v. Moore-McCormack Lines, Inc.,* 386 U.S. 724, 87 S.Ct. 1410 (1967); and *Mascuilli v. United States, supra,* establishing the doctrine of unseaworthiness as a species of liability without fault, is firmly entrenched in the Maritime Law and applies to those shore workers who perform duties on board the vessel traditionally done or performed by seamen, *Pope & Talbot, Inc. v. Hawn, supra.* In the case at bar, like in *Mascuilli v. United States, supra; Crumady v. Joachim Henrik Fisser, et al,* 70 S.Ct. 445 (1959); *Grillea v. United States,* 232 F.2d 919 (2nd Cir. 1956, C.A.), and a host of others, the longshoremen misused seaworthy equipment, causing injuries. The shadowy distinction contended for by Respondent which would require negligent acts of a longshoreman to create a "condition" of some duration must not be permitted to dilute these workers' protections. Such unrealistic test is a throwback to the *Cookingham v. United States,* 184 F.2d 213 (1950), C.A. 3rd Cir.) and *Adamowsky v. Gulf Oil Corp.,* 93 F. Supp. 115 — affd. 197 F.2d 523 rejected by this court in *Mitchell v. Trawler Racer, Inc., supra.*

It is respectfully submitted that this court's decision in *Mascuilli v. United States, supra,* establishes that the misuse of seaworthy equipment by longshoremen can render the vessel unseaworthy or what is called operational negligence.

Perhaps the best example, supported by ample authority, would be the situation where one longshoreman drops some oil or grease on the deck and as he drops it another longshoreman steps backwards and slips on it, sustaining injuries. Undoubtedly a momentary occurrence. Yet, liability is imposed. *Pierce v. Erie Railroad Co.*, 165 F. Supp. 216; *Yanow v. Weyerhauser Steamship Co.*, 250 F.2d 74; *Oakes v. Graham Towing Co.*, 135 F. Supp. 485. There is no difference between the case at bar and Mascuilli, supra. In Mascuilli, the Trial Court found:

> "* * * the vessel and all of its equipment was in a seaworthy condition at all times, and remained so throughout the entire loading operations. *The accident was caused solely by the negligent operation of the stevedoring crew using seaworthy equipment in such a manner as to cause the accident to occur so instantaneously that the Third Officer was unable to warn anyone or prevent its happening.*" (Emphasis ours)

On such finding, this court unanimously found liability. It is obvious in Mascuilli the fatal injuries occurred because of the negligence of a fellow longshoreman which, as the trial court found, "happened suddenly and without warning; he had no time to warn or instruct the winchman or the signalman-foreman before the accident occurred", substantially, like the case at bar.

Mascuilli decision is but a natural sequence of this court's rule which governs all cases involving workers who do work traditionally done by seamen. Thus, if a seaman on board a vessel would sustain the injuries which Petitioner here suffered, brought about by a fellow seaman's negligent handling of seaworthy ship's gear, there

would be no question that such unseaworthiness producing injury would impose liability.

This court, as far back as *Seas Shipping Co. v. Sieracki, supra,* has unequivocally held:

> "'* * * It seems, therefore, that when a man is performing a function essential to maritime service on board a ship the fortuitous circumstances of his employment by the shipowner or a stevedoring contractor should not determine the measure of his rights. This is the very basis on which the Jones Act was held applicable to give redress to an injured stevedore in International Stevedoring Co. v. Haverty, * * *' 3 Cir., 149 F.2d 98, 101."

And more particularly spelled out in the same case, 66 S.Ct. 880:

> "* * * It is that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and *statutory* protections, regardless of the fact that he is employed immediately by another than the owner. For these purposes he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards." (Emphasis ours)

It is precisely because of this holding that the Fifth Circuit in *Flowers v. Savannah Machine & Foundry Co.,* 310 F.2d 135 (1962), speaking through Chief Judge Brown, reasserts the proposition that a longshoreman is entitled to the *statutory and traditional rights of seamen* by stating: (p. 139, 310 F.2d 135):

> "Of course, the *Sieracki*-seaman is not a real full-fledged seaman for all purposes. He has, for example,

> no claim for the traditional right to maintenance, wages and cure. But the law reasons that in doing the work essentially that of a seaman who is a regular crew member, such vicarious seamen are entitled to comparable, if not identical, protection and *sanctions.* * * *" (Emphasis ours)

In *Sieracki* the court addressed itself to the shipowner's obligations as follows:

> "* * * As we have said, he is at liberty to conduct his business by securing the advantages of specialization in labor and skill brought about by modern divisions of labor. He is not at liberty by doing this to discard his traditional responsibilities. That the law permits him to substitute others for responsibilities peculiar to the employment relation does not mean that he can thus escape the duty it imposes of a more general scope. To allow this would be, in substantial effect, to convert the ancient liability for maritime tort into a purely contractual responsibility. This we are not free to do."

This court's affirmance of the Circuit Court's decision in this case would run directly contrary to its holding that a shipowner may contract the work of loading or discharging its vessel by having it done with the advantages of more modern divisions of labor, he nevertheless cannot minimize the worker's hazards and should not nullify his protection, Sieracki, supra. Failure to adhere to this established rule would dilute this court's holding in Sieracki, page 876, wherein it said:

> "* * * And it would hardly seem consistent with the obligation's benevolent purposes that the owner might nullify it by the device of having all who man the

> ship hired by others willing to furnish men for such service at sea or ashore."

Respondent's argument, page 5-20 of its brief seeks to induce this court to turn back the clock and erase decades of progressive legislative intent and judicial decisions which takes cognizance if our dynamic and ever expanding economic progress. Progress which could not exist without judicial recognition and sanction. *Moragne v. States Marine Lines, Inc., et al,* 90 S.Ct. 1277 (1970).

Respondents' lament that:

> "* * * there has been an ever-broadening liability of the shipowner to an extent not dreamed of three or four decades ago. A ship may now become actionably unseaworthy while at sea as well as in foreign ports, even though it departed on its voyage in perfect condition."

has been heard before in both the courts and Congress. It is precisely such contentions which caused Judge Skelly Wright, now of the Circuit Court of Appeals for the District of Columbia to say in *Casbon v. Stockard Steamship Corporation,* 173 F. Supp., 845 (E.D. Louisiana, 1959):

> "* * * This contention, however, is not new. It simply has been dead so long counsel are unaware it was ever made. This precise argument was made, considered and rejected in Seas Shipping Co., Inc. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099. It should be laid back to rest for it provides no solution to the problem at hand. This problem must be dealt with upon a consideration of the warranty of seaworthiness as applied to the employee of a stevedoring contractor.

> "Despite much weeping and gnashing of teeth by interests adversely affected, the doctrine of liability without fault remains firmly embedded in the general maritime law. The extension of this doctrine, however, to cover an increasing circle of harbor workers has been arrested, at least temporarily. Moreover, there remain undecided questions concerning the application of the doctrine to transitory unseaworthiness or unseaworthiness caused by operating negligence."

It is noteworthy that Judge Wright's decision in Casbon was rendered prior to this court's decision in *Mitchell v. Trawler Racer, Inc., supra,* and of course, *Mascuilli v. United States, supra.*

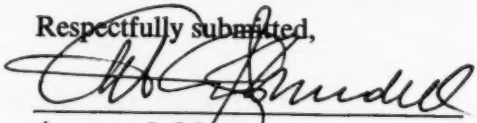
Respondent's fear of the trial court's difficulties in formulating interrogatories or articulating a charge to the jury are groundless (page 12 of Respondent's brief). We can perceive no problem in the submission of any instruction in a fact situation such as in the case at bar. Many more complicated factual circumstances giving rise to legal liability have been successfully submitted to a jury. Here the interrogatory would simply inquire whether the negligent operation by the longshoreman of seaworthy ship's equipment creates an unreasonable risk of harm. Such legal principles are neither revolutionary nor do violence to the doctrine of Stare Decisis as applied to these "pro hac vice seamen."

Neither do we find anything in Justice Harlan's decision in Moragne, supra, to warrant respondent's interpretation (Respondent's brief, page 19) of the holding in Moragne, whether it be done by paraphrasing or plagiarism. Moragne does not restrict rights, in logic and reason, it extends them.

CONCLUSION

Under the guide lines set forth in *Sieracki; Pope & Talbot v. Hawn;* and *Mascuilli* and others, the facts in the case at bar make out a case of unseaworthiness for which Respondents are liable. The decision of the Court of Appeals for the Fifth Circuit is at variance with the decisions of this Court and those of the Court of Appeals for the Second, Third and Fourth Circuits. It is therefore respectfully prayed that the decision of the Court of Appeals be reversed and the case remanded to the Trial Court for the assessment of damages, or alternatively for a trial on the merits.

Respectfully submitted,



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FILE COPY

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E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 47

JOSEPH CHARLES USNER

Petitioner

versus

LUCKENBACH OVERSEAS CORPORATION and ISTHMIAN LINES, INC.

Respondent

APPLICATION FOR RE-HEARING

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Respondent

APPLICATION FOR REHEARING

PETITION FOR RE-HEARING

Petitioner, Joseph Charles Usner, presents this petition for a re-hearing of the above entitled cause and in support, thereof, respectfully shows:

I.

The majority opinion is erroneous in holding that an isolated personal act of negligence by a fellow longshoreman which resulted in injury to the petitioner did not render the ship owner liable due to the unseaworthiness of its vessel.

II.

The majority opinion is erroneous in holding in effect that the unseaworthiness of a vessel must be caused by the ship's condition, appurtenances, cargo or crew.

III.

The majority opinion is erroneous in not holding that although there is a "complete divorcement of unseaworthiness liability from concepts of negligence" that operational negligence is one sturdy type of unseaworthiness.

IV.

The majority opinion is erroneous in misinterpreting *Mascuilli vs United States*, 387 U. S. 237.

V.

The majority opinion is erroneous in not following this Court's clear and positive prior decisions which are apposite and controlling here.

ARGUMENT

The majority opinion, with Mr. Justice Stewart as the organ of the Court, is a feeble attempt to subvert the fundamental principle of the unseaworthiness doctrine which has been painstakingly enunciated by this Court over the years. In the opinion, Mr. Justice Stewart seems obsessed with the idea that the Court has repeatedly taken pains to point out that liability based upon unseaworthiness is wholly distinct from liability based upon negligence. No one quarrels with this, but it is a well-recognized principle that must be accepted, that unseaworthiness can and does result with or without negligence.

The majority opinion states on page 6, "What has evolved in our case law, we said, is the 'complete divorcement of unseaworthiness liability from concepts of negligence'. 362 U. S. 550." Again we say, this does not subtract from the universally recognized concept that unseaworthiness may be caused by acts of operational negligence. Negligence, if found, does not negate unseaworthiness but may be the very act by which the "condition" of unseaworthiness results. Almost every condition of unseaworthiness may be traced to an act of negligence.

This Court has held that operational negligence makes a ship unseaworthy in the following:

In *Mahnich*, the choosing of rotten rope instead of available good rope, was an isolated negligent act which created an unseaworthy condition.

In *Crumady*, the setting of the cutoff device on the winches incorrectly, was an isolated act of negligence which created a condition of unseaworthiness.

In *Gutierrez*, with Mr. Justice White as the organ of the Court, the method of loading cargo, or the negligent manner of its storage, was the negligent act which created a condition of unseaworthiness.

And in *Mascuilli*, the misuse of otherwise seaworthy equipment was an isolated negligent act which created a condition of unseaworthiness.

These cases are no different from the case at bar, in that each involved a so-called isolated act of negligence which resulted in an unsafe place in which to work —

or an unseaworthy condition which was the source of injury to a Sieracki seaman. In those cases, the Court did not concern itself with measuring the lapse of time between the negligent act and the occurrence of the injury or manner in which the condition of unseaworthiness was created. It was of no moment that the unseaworthiness was due to operational negligence or to some other conventional type of unseaworthiness. This Court did not resort to splitting hairs and measuring time lapses between act and condition. Where the condition was found to exist, the ship owner was held absolutely liable.

The majority opinion on page 6 states that petitioner's injuries were not caused by ". . . the condition of the ship, her appurtenances, her cargo or her crew, but the isolated, personal, negligent act of the petitioner's fellow longshoreman." Never has this Court limited the scope of unseaworthiness to that of, "the condition of the ship, her appurtenances, her cargo or her crew". The majority recognized this on page 6 when it cited as authority for the non-limitation doctrine, *Mahnich*, *Sieracki*, *Boudoin*, *Waldron* and *Gutierrez*.

Prior to the majority opinion in the case at bar, this Court has never held that an unseaworthy condition could not be caused by the, "isolated, personal negligent act of the petitioner's fellow longshoreman", (or fellow seaman). In all of its prior decisions, this Court has held that isolated acts of operational negligence make a ship unseaworthy. See *Mahnich*, *Crumady*, *Gutierrez*, and *Mascuilli*.

The majority opinion further stated and we quote, "To hold that this individual act of negligence (the isolated, personal act of negligence of the petitioner's

fellow longshoreman), rendered the ship unseaworthy would be to subvert the fundamental distinction between unseaworthiness and negligence that we have so painstakingly and repeatedly emphasized in our decisions."

In no way would the holding that an individual act of negligence renders a ship unseaworthy subvert the fundamental distinction between unseaworthiness and negligence. In fact, to hold otherwise is to ignore prior decisions of this Court to the effect that isolated, personal negligent acts may very well bring about a condition of unseaworthiness.

The majority opinion stated on page 6 and 7, "In *Trawler Racer*, supra, there existed a condition of unseaworthiness, and we held it was error to require a finding of negligent conduct in order to hold the ship owner liable". In *Trawler Racer*, the condition of unseaworthiness was the fish curry spilled upon the ship's railing, which spilling was caused by the actions of individuals. The *Trawler Racer* Court was correct in holding that it was error to require a finding of negligent conduct in order to hold the ship owner liable. It would also have been error for the Court to have found that the negligent conduct did not bring about the unseaworthy condition.

The majority opinion stated on page 5, "More specifically, the Court has repeatedly taken pains to point out that liability based upon unseaworthiness is wholly distinct from liability based upon negligence. The reason, of course, is that unseaworthiness is a *condition*, and how that condition comes into being — whether by negligence or otherwise — is quite irrelevant to the owner's liability

for personal injuries resulting from it". The above is a correct statement of the law as enunciated by this Court in its prior decisions, yet the majority opinion, while pronouncing a correct statement of the law, proceeded to an incorrect application.

The majority opinion continues on page 7, "The case before us presents the other side of the same coin. For it would be equally erroneous here, where no condition of unseaworthiness existed, to hold the ship owner liable for a third party's single and wholly unforeseeable act of negligence".

The other side of the same coin is the same. In the instant case, there did exist a condition of unseaworthiness — transitory, temporary or instantaneous, though it may have been — just as the spilling of the fish curry on the rail in the *Trawler Racer* the negligence of choosing a rotten rope in *Mahnich*, the negligent act of setting the cut off device on the winches incorrectly in *Crumady*, the negligent method of loading cargo in *Gutierrez*, the negligent operation of a seaworthy winch in *Mascuilli*, all of which make for an unseaworthy condition. The unseaworthy condition here was caused by the negligent "Sieracki Seaman" in negligently lowering the sling which struck petitioner. If the sling had broken, there would have been no problem in finding the ship to have been unseaworthy. There should, therefore, be no problem in finding the ship to be in an unseaworthy condition due to the negligent action of a third party. It is irrelevant as to how the condition of unseaworthiness came into being.

The majority's attempt to place *Usner* on the other side of the same coin and hold that operational negligence

does not in itself bring about a condition of unseaworthiness in effect destroys the coin itself. At least it destroys what has heretofore been recognized as ". . . one sturdy type of unseaworthiness" — that which is caused by operational negligence. This was pointed out by Mr. Justice Douglas in his dissent at page 3.

As the dissenting opinion of Mr. Justice Harlan correctly states, *Crumady* cannot be distinguished from *Usner*. The issue in *Usner* was decided in *Crumady*. *Mascuilli* was a restatement of *Crumady*, and for that reason *Crumady* was cited in support of the Per Curiam opinion in *Mascuilli*. In the wake of *Usner*, frustration, confusion, uncertainty and inequities will result and private rights will be lost. Because of the conflict in the Circuits, it was hoped that *Usner* would be a beacon and light the way, and that a course would be charted by this Court, for the Circuits to follow, but the majority did not address itself to the issue at hand — act and condition. Where does act begin and end; where does condition begin? Can they occur simultaneously and under what circumstances? As the writ was granted because of the conflict in the Circuits, it is submitted that the opinion should have addressed itself to the issue. If as the majority says the first question presented in *Mascuilli* was answered affirmatively then the confusion in the Circuits which existed over the issue of operational negligence has not been resolved in *Usner*. *Usner* it appears in the opinion of the majority is distinguished from other operational negligence cases. How ironical it is that prior to the 1970 term, the *Usner* judgment denying recovery would have been reversed probably out of hand, as Mr. Justice Douglas pointed out in the dissenting opinion. This should have been the decision on January 25th,

1971, if prior decisions of this Court mean anything at all.

It is interesting to note the division of the Court in this case as to their respective dates of appointment and time of service on this Honorable Court.

The four Justices who dissented are:

Mr. Justice Hugo L. Black, August 19, 1937,

Mr. Justice William O. Douglas, April 17, 1939,

Mr. Justice John M. Harlan, March 28, 1955,

Mr. Justice William J. Brennan, October 16, 1956.

The five Justices who composed the majority and the respective dates on which they took office are as follows:

Mr. Justice Potter Stewart, October 14, 1958,

Mr. Justice Byron R. White, April 16, 1962,

Mr. Justice Thurgood Marshall, October 2, 1967,

Chief Justice Warren E. Burger, June 23, 1969,

Mr. Justice Harry R. Blackmun, June 9, 1970.

It is of paramount significance to examine the composition of the *Mascuilli* Court and the *Usner* Court to determine what this Court decided in *Mascuilli*.

The *Mascuilli* Court was composed of the following:

Chief Justice Earl Warren, retired June 23, 1969,

Mr. Justice Tom C. Clark, retired June 12, 1967,

Mr. Justice Abe Fortas, retired May 12, 1969,

all of whom concurred in the granting of the writ in *Mascuilli*, and,

Mr. Justice Hugo L. Black,

Mr. Justice William O. Douglas,

Mr. Justice William J. Brennan, Jr., who also concurred in the granting of the writ and,

Mr. Justice John M. Harlan,

Mr. Justice Potter Stewart,

Mr. Justice Byron R. White,

who dissented from the granting of the writ.

The members of the Court which decided *Usner* are as follows:

Chief Justice Warren E. Burger,

Mr. Justice Hugo L. Black,

Mr. Justice William O. Douglas,

Mr. Justice John M. Harlan,

Mr. Justice William J. Brennan, Jr.,

Mr. Justice Potter Stewart,

Mr. Justice Byron R. White,

Mr. Justice Thurgood Marshall,

Mr. Justice Harry R. Blackmun.

The majority in *Usner* was composed of two dissenters (Justices Stewart and White), from the granting of the writ in *Mascuilli*, and three post-*Mascuilli* Justices (Chief Justice Burger, Justice Blackmun and Justice Marshall, who was the Solicitor General and counsel for the United States of America in the *Mascuilli* case).

Though the majority states that petitioner's reliance on *Mascuilli* is misplaced, it is submitted that the *Mascuilli* Court decided the second issue presented to it affirmatively, that is, that the negligent handling of proper equipment by a longshoreman creates a dangerous condition rendering the vessel unseaworthy.

It is submitted that one must look to the dissenters in *Usner* (Justices Black, Douglas, Brennan and Harlan), who were all members of the *Mascuilli* Court for the answer as to which issue was affirmatively decided.

Though Justice Harlan dissented from the granting of the *Mascuilli* writ, he leaves no doubt in his dissenting opinion in *Usner* that *Crumady* decided the issue presented in *Usner* and that it was cited in *Mascuilli* in support of the Court's affirmative answer to the second question presented.

Mr. Justice Stewart, who dissented in granting writs in *Mascuilli*, attempts to explain what the Supreme Court meant in its Per Curiam decision in *Mascuilli* Footnote 19, Page 6 of the opinion. He states that peti-

tioner's reliance upon *Mascuilli* is misplaced. He points out that the petition for certiorari posed three questions:

"1. Did a prior unseaworthy condition come into play by the tightline condition?

2. Did the negligent handling of proper equipment by the longshoremen create a dangerous condition rendering the vessel unseaworthy?

3. Was the vessel unseaworthy because the longshoremen were 'not equal in disposition and seamanship to the ordinary men in the calling', as was found in *Boudoin vs. Lykes Brothers*, 348 U.S. 336 (1955)?"

He further states, and we quote, "Our Per Curiam reversal cited two cases: *Mahnich vs. Southern S. S. Co.*, 321 U.S. 96, and *Crumady vs. The J. H. Fisser*, 358 U.S. 423. *Mahnich* involved a defective rope, *Crumady* a defective winch. It seems evident therefore, that it was the first question posed by the petition for certiorari to which the Court gave an affirmative answer."

This interpretation of the *Mascuilli* decision by Mr. Justice Stewart is contrary to the interpretation given to it by Mr. Justice William O. Douglas, and the dissenters in *Usner*, who were in the majority granting the writ and rendering the decision. Mr. Justice Douglas states his interpretation of *Mascuilli* as follows:

"In *Mascuilli vs. U.S.*, 387 U.S. 237, negligent use of a winch in a loading operation so obviously made the vessel *pro tanto* unseaworthy that we reversed out of hand a judgment of no liability citing *Mahnich* and *Crumady*." Page 2 of the dissenting opinion.

Mr. Justice Douglas, in his dissent, pointed out on page 1, "In *Mahnich*, the staging from which the seaman fell was an unseaworthy appliance because of the defective rope with which it was rigged. There was sound rope on board, but defective rope was used. The fact that the mate and boatswain were negligent in selecting defective rope was held to be no defense."

Mr. Justice Douglas, in his dissent, further points out in *Crumady*, ". . . a winch was not inherently defective as was the rope in *Mahnich*. But it was used in a way which made it unsafe and dangerous for the work at hand. While the rigging would take only three tons of stress, the cutoff of the winch, 'its safety device, was set at twice that limit Id., at 427. And so the rope sling broke and injured the seaman. The vessel which paid the damages was allowed to recover over from the stevedores whose negligence with the winch made the vessel *pro tanto* unseaworthy."

We submit that Mr. Justice Douglas' interpretation of the holding in *Mahnich* and *Crumady* is correct and that *Mascuilli* answered the second question posed.

CONCLUSION

In conclusion, it is submitted that the majority opinion overlooked the basis of petitioner's complaint. The complaint in the present case asserts a cause of action based upon the unseaworthiness of the vessel.

Petitioner's complaint is not based upon the negligence of the winch operator. It is irrelevant and immaterial that the condition of unseaworthiness was due to the negligent act of the winch operator.

For the foregoing reasons, it is respectfully urged that

the petition for re-hearing be granted and that upon further consideration, the judgment of this Honorable Court rendered on January 25, 1971, be set aside and a decision entered, reversing the Judgment of the Court of Appeals for the Fifth Circuit and granting petitioner relief as prayed for.

Respectfully submitted,

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CERTIFICATE

I, H. Alva Brumfield, counsel for the above-named Petitioner, do hereby certify that the above and foregoing Petition for Re-hearing is presented in good faith and not for delay.

I further certify that a copy of the above Petition for Re-hearing was mailed to Charles Kohlmeyer, counsel for Respondent, at 1800 NBC Building, New Orleans, Louisiana, 70112.

H. ALVA BRUMFIELD

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

USNER *v.* LUCKENBACH OVERSEAS CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 47. Argued November 18, 1970—Decided January 25, 1971

Isolated, personal act of negligence by a fellow longshoreman resulting in injury to petitioner did not make shipowner liable on ground of unseaworthiness of vessel, as injury was not caused by ship's condition, appurtenances, cargo, or crew. There is a "complete divorcement of unseaworthiness liability from concepts of negligence." *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 550. Pp. 3–7.

413 F. 2d 984, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion in which BLACK and BRENNAN, JJ., joined. HARLAN, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 47.—October Term, 1970

Joseph Charles Usner, Petitioner, *v.* Luckenbach Overseas Corporation et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January 25, 1971]

Mr. Justice Stewart delivered the opinion of the Court.

The petitioner, a longshoreman employed by an independent stevedoring contractor, was injured while engaged with his fellow employees in loading cargo aboard respondent's ship, the *S. S. Edgar F. Luckenbach.* He brought this action for damages against the respondent in a federal district court, alleging that his injuries had been caused by the ship's unseaworthiness.

In the course of pretrial proceedings the circumstances under which the petitioner had been injured were fully disclosed, and they are not in dispute. On the day in question the ship lay moored to a dock in New Orleans, Louisiana, receiving cargo from a barge positioned alongside. The loading operations were being performed by the petitioner and his fellow longshoremen under the direction of their employer. Some of the men were on the ship, operating the port winch and boom at the No. 2 hatch. The petitioner and others were on the barge, where their job was to "break out" the bundles of cargo by securing them to a sling attached to the fall each time it was lowered from the ship's boom by the winch operator. The loading operations had been proceeding in

this manner for some time, until upon one occasion the winch operator did not lower the fall far enough. Finding the sling beyond his reach, the petitioner motioned to the flagman standing on the deck of the ship to direct the winch operator to lower the fall farther. The winch operator then lowered the fall, but he lowered it too far and too fast. The sling struck the petitioner, knocking him to the deck of the barge and causing his injuries. Neither before nor after this occurrence was any difficulty experienced with the winch, boom, fall, sling, or any other equipment or appurtenances of the ship or its cargo.

The respondent moved for summary judgment in the District Court, upon the ground that a single negligent act by a fellow longshoreman could not render the ship unseaworthy. The District Court denied the motion, but granted the respondent leave to take an interlocutory appeal under 28 U. S. C. § 1292 (b).[1] The United States Court of Appeals for the Fifth Circuit allowed the appeal and, reversing the District Court, directed that the respondent's motion for summary judgment be granted. 413 F. 2d 984. It was the appellate court's view that "'[i]nstant unseaworthiness' resulting from 'operational negligence' of the stevedoring contractor is not a basis for recovery by an injured longshoreman." 413 F. 2d,

[1] 28 U. S. C. § 1292 (b) provides as follows:

"When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

at 985–986. We granted certiorari, 397 U. S. 933, because of a conflict among the circuits on the basic issue presented.[2]

The development in admiralty law of the doctrine of unseaworthiness as a predicate for a shipowner's liability for personal injuries or death has been fully chronicled elsewhere, and it would serve no useful purpose to repeat the details of that development here.[3] Suffice it to recall that from its humble origin as a dictum in an obscure case in 1922,[4] the doctrine of liability based upon unseaworthiness has experienced a most extraordinary expansion in a series of cases decided by this Court over the last 25 years.[5] The Court's decisions in some of those cases have been severely questioned, by dissenting Justices and

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[2] Compare *Candiano* v. *Moore-McCormack Lines, Inc.*, 382 F. 2d 961 (CA2); *Alexander* v. *Bethlehem Steel Corp.*, 382 F. 2d 963 (CA2); *Cleary* v. *United States Lines Co.*, 411 F. 2d 1009 (CA2); and *Venable* v. *A/S Det Forenede Dampskibsselskab*, 399 F. 2d 347 (CA4), with *Grigsby* v. *Coastal Marine*, 412 F. 2d 1011 (CA5), and *Tim* v. *American President Lines, Ltd.*, 409 F. 2d 385 (CA9).

[3] See *Mitchell v. Trawler Racer*, 362 U. S. 539; *id.*, at 550 (dissenting opinion of Frankfurter, J.); see also, Gilmore and Black, The Law of Admiralty (1957), pp. 315–332; Tetreault, Seamen, Seaworthiness, and the Rights of Harbor Workers, 39 Cornell L. Q. 381.

[4] *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255. There it was said, "[w]e think the trial court might have told the jury that without regard to negligence the vessel was unseaworthy when she left the dock . . . and that if thus unseaworthy and one of the crew received damage as the direct result thereof, he was entitled to recover compensatory damages." 259 U. S., at 259.

[5] *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96; *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406; *Alaska Steamship Co. v. Petterson*, 347 U. S. 396; *Rogers* v. *United States Lines*, 347 U. S. 984; *Boudoin* v. *Lykes Bros. S. S. Co.*, 348 U. S. 336; *Crumady* v. *The J. H. Fisser*, 358 U. S. 423; *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539; *A. & G. Stevedores* v. *Ellerman Lines*, 369 U. S. 355; *Gutierrez* v. *Waterman S. S. Corp.*, 373 U. S. 206; *Waldron* v. *Moore-McCormack Lines*, 386 U. S. 724.

by others, on the basis of history, reason, and logic.[6] The present case, however, offers no occasion to re-examine any of our previous decisions. We may accept it as fully settled that a shipowner's liability for an unseaworthy vessel extends beyond the members of the crew and includes a longshoreman like the petitioner.[7] We may accept it as settled, too, that the shipowner is liable though the unseaworthiness be transitory,[8] and though the injury be suffered elsewhere than aboard the ship.[9] But these propositions do not dispose of the case before us. For the question here goes to the very definition of what unseaworthiness is and what it is not.

A major burden of the Court's decisions spelling out the nature and scope of the cause of action for unseaworthiness has been insistence upon the point that it is a remedy separate from, independent of, and additional to other claims against the shipowner, whether created

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[6] See, *e. g.*, *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, at 105 (dissenting opinion of Roberts, J., joined by Frankfurter, J.), *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, at 103 (dissenting opinion of Stone, C. J., joined by Frankfurter and Burton, JJ.); *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, at 419 (dissenting opinion of Jackson, J., joined by Reed and Burton, JJ.); *Alaska Steamship Co.* v. *Petterson*, 347 U. S. 396 (dissenting opinion of Burton, J., joined by Frankfurter and Jackson, JJ.); *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, at 550 (dissenting opinion of Frankfurter, J., joined by HARLAN and Whittaker, JJ.); *Gutierrez* v. *Waterman S. S. Corp.*, 373 U. S. 206, at 216 (dissenting opinion of HARLAN, J.); *Waldron* v. *Moore-McCormack Lines*, 386 U. S. 724, at 729 (dissenting opinion of WHITE, J., joined by HARLAN, BRENNAN, and STEWART, JJ.).

See also Gilmore and Black, The Law of Admiralty (1957), pp. 315–332; Tetreault, Seamen, Seaworthiness, and the Rights of Harbor Workers, 39 Cornell L. Q. 381.

[7] *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85.

[8] *Crumady* v. *The J. H. Fisser*, 358 U. S. 423; *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539.

[9] *Gutierrez* v. *Waterman S. S. Co.*, 373 U. S. 206.

by statute[10] or under general maritime law.[11] More specifically, the Court has repeatedly taken pains to point out that liability based upon unseaworthiness is wholly distinct from liability based upon negligence.[12] The reason, of course, is that unseaworthiness is a *condition*, and how that condition came into being—whether by negligence or otherwise—is quite irrelevant to the owner's liability for personal injuries resulting from it.

We had occasion to emphasize this basic distinction again in *Mitchell* v. *Trawler Racer*, 362 U. S. 539. There the unseaworthy condition causing the plaintiff's injury was a ship's rail made slippery by the presence of fish gurry and slime. The trial judge had instructed the jury that the shipowner could be held liable for this unseaworthy condition only upon a finding that the slime and gurry had been on the ship's rail for a time long enough for the respondent to have learned about it and to have removed it. The Court of Appeals affirmed the judgment for the defendant shipowner, holding that at least with respect to "an unseaworthy condition which arises only during the progress of the voyage," the shipowner's obligation "is merely to see that reasonable care is used under the circumstances . . . incident to the correction of the newly arisen defect." 265 F. 2d 426, 432. We reversed the judgment, holding that the trial and appel-

[10] *E. g.*, the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688. The petitioner in the present case was fully covered, of course, by the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 *et seq.*

[11] *E. g.*, maintenance and cure. See *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525; *Waterman S. S. Corp.* v. *Jones*, 318 U. S. 724; *Farrell* v. *United States*, 336 U. S. 511; *Warren* v. *United States*, 340 U. S. 523.

[12] *E. g.*, *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, at 94: "[T]he liability is neither limited by conceptions of negligence nor contractual in character."

late courts had been wrong in confusing liability for negligence with liability for unseaworthiness. What has evolved in our case law, we said, is the "complete divorcement of unseaworthiness liability from concepts of negligence." 362 U. S., at 550.

Trawler Racer involved the defective condition of a physical part of the ship itself. But our cases have held that the scope of unseaworthiness is by no means so limited. A vessel's condition of unseaworthiness might arise from any number of circumstances. Her gear might be defective,[13] her appurtenances in disrepair,[14] her crew unfit.[15] The number of men assigned to perform a shipboard task might be insufficient.[16] The method of loading her cargo, or the manner of its stowage, might be improper.[17] For any of these reasons, or others, a vessel might not be reasonably fit for her intended service.

What caused the petitioner's injuries in the present case, however, was not the condition of the ship, her appurtenances, her cargo or her crew,[18] but the isolated, personal negligent act of the petitioner's fellow longshoreman. To hold that this individual act of negligence rendered the ship unseaworthy would be to subvert the fundamental distinction between unseaworthiness and negligence that we have so painstakingly and repeatedly emphasized in our decisions.[19] In *Trawler Racer, supra,*

[13] *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96.

[14] *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85.

[15] *Boudoin* v. *Lykes Bros. S. S. Co.*, 348 U. S. 336.

[16] *Waldron* v. *Moore-McCormack Lines*, 386 U. S. 724.

[17] *A. & G. Stevedores* v. *Ellerman Lines*, 369 U. S. 355; *Gutierrez* v. *Waterman S. S. Co.*, 373 U. S. 206.

[18] No member of the ship's crew was in any way involved in this case.

[19] The petitioner's reliance upon our summary *Per Curiam* reversal of a judgment for the shipowner in *Mascuilli* v. *United States*, 387 U. S. 237, is misplaced. There a longshoreman had been killed during a loading operation aboard a Government vessel when, under the

there existed a condition of unseaworthiness, and we held it was error to require a finding of negligent conduct in order to hold the shipowner liable. The case before us presents the other side of the same coin. For it would be equally erroneous here, where no condition of unseaworthiness existed, to hold the shipowner liable for a third party's single and wholly unforeseeable act of negligence. The judgment of the Court of Appeals is affirmed.

It is so ordered.

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strain of the opposing pull of two winches, a heavy shackle parted, recoiled, and struck him. The petition for certiorari posed three questions: (1) Did a prior unseaworthy condition come into play by the tightline condition? (2) Did the negligent handling of proper equipment by the longshoremen create a dangerous condition rendering the vessel unseaworthy? (3) Was the vessel unseaworthy because the longshoremen were "not equal in disposition and seamanship to the ordinary men in the calling," as was found in *Boudoin* v. *Lykes Brothers*, 348 U. S. 336 (1955)?

Our *Per Curiam* reversal cited two cases: *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, and *Crumady* v. *The J. H. Fisser*, 358 U. S. 423. *Mahnich* involved a defective rope, *Crumady* a defective winch. It seems evident, therefore, that it was the first question posed by the petition for certiorari to which the Court gave an affirmative answer.

SUPREME COURT OF THE UNITED STATES

No. 47.—October Term, 1970

Joseph Charles Usner, Petitioner, *v.* Luckenbach Overseas Corporation et al.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January 25, 1971]

Mr. Justice Douglas, with whom Mr. Justice Black and Mr. Justice Brennan concur, dissenting.

While petitioner was working on a barge loading cargo into a hatch of the ship, he was injured as a result of the negligent operation of a winch. The winch was part of the ship and the winch operator was a member of the crew of the stevedores. The injury was caused by a lowering of a sling which carried the cargo too quickly and too far, injuring petitioner.

Prior to the 1970 Term the judgment denying recovery would have been reversed, probably out of hand. We held in *Mahnich* v. *Southern SS Co.*, 321 U. S. 96, that the obligation of an owner to furnish a seaworthy ship extends to seaworthy appliances. We also held that the owner was not insulated from liability by the "negligent failure" of his officers or members of the crew to furnish seaworthy appliances. *Id.*, at 101. In *Mahnich*, the staging from which the seaman fell was an unseaworthy appliance because of the defective rope with which it was rigged. There was sound rope on board but defective rope was used. The fact that the mate and boatswain were negligent in selecting defective rope was held to be no defense.

In *Crumady* v. *J. H. Fisser*, 358 U. S. 423, a winch was not inherently defective as was the rope in *Mahnich*. But it was used in a way which made it unsafe and dangerous for the work at hand. While the rigging

would take only three tons of stress, the cutoff of the winch, "its safety device," was set at twice that limit *Id.*, at 427. And so the rope sling broke and injured the seaman. The vessel which paid the damages was allowed to recover over from the stevedores whose negligence with the winch made the vessel *pro tanto* unseaworthy.

In *Mascuilli* v. *United States*, 387 U. S. 237, negligent use of a winch in a loading operation so obviously made the vessel *pro tanto* unseaworthy that we reversed out of hand a judgment of no liability citing *Mahnich* and *Crumady*.

What we said in *Mitchell* v. *Trawler Racer*, 362 U. S. 539, 550, about the "complete divorcement of unseaworthiness liability from concepts of negligence" related to a condition which made the vessel not "reasonably suitable for intended service." Yet alongside that conventional type of unseaworthiness there developed the concept of unseaworthiness resulting from operational negligence.

Indeed, the doctrine of operational negligence which causes unseaworthiness has had a sturdy growth. Chief Justice Stone, writing for the Court in *Mahnich*, showed that this doctrine goes at least as far back as *The Osceola*, 189 U. S. 158, decided in 1903. See 321 U. S., at 101–104. The intervening decision of *Plamals* v. *Pinar del Rio*, 277 U. S. 151, which looked the other way was decided in 1928. It was around that case that Justices Roberts and Frankfurter turned their dissent, saying that unless the Court followed precedent "the law becomes not a chart to govern conduct but a game of chance; instead of settling rights and liabilities it unsettles them." 321 U. S., at 112. They added:

> "Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy." *Id.*, at 113.

Justices Roberts and Frankfurter bitterly expressed that view in *Mahnich* when *Pinar del Rio* was overruled—a freak decision not in keeping with mainstream of the law that had come before.

Changes in membership do change decisions; and those changes are expected at the level of constitutional law. But when private rights not rooted in the Constitution are at issue, it is surprising to find law made by new judges taking the place of law made by prior judges.

Up to today operational negligence has been one sturdy type of unseaworthiness.* I would let it continue as the prevailing rule unless Congress in its wisdom changes it.

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*The Second Circuit adopted the view that while one act of operational negligence would not make a vessel unseaworthy, unseaworthiness did result if the negligent act was incident to a continuous course of operation as where a wrong hatch cover was used, *Grillea* v. *United States*, 232 F. 2d 919, but not by an isolated act as where a boom was carrying a dangerous stress due to a negligent act. *Puddu* v. *Royal Netherlands*, 303 F. 2d 752. The difference in the two cases was stated as follows:

"A ship is not unseaworthy because it has glass in a window which might be broken. The injuries of a seaman who negligently breaks such a glass are not the result of unseaworthiness, nor are the injuries of a seaman who is cut by the falling glass. But injury incurred in stepping on the broken glass does result from unseaworthiness." *Id.*, at 757.

The Second Circuit, however, refused to follow *Grillea* after our *Mascuilli* decision. *Candiano* v. *Moore-McCormack Lines Inc.*, 382 F. 2d 961; *Alexander* v. *Bethlehem Steel Corp.*, 382 F. 2d 963; *Cleary* v. *United States Lines*, 411 F. 2d 1009; *Tarabocchia* v. *Zim Isreal Navigation Co.*, 417 F. 2d 476. The Fourth Circuit followed suit. *Venable* v. *A/S Det Forende*, 399 F. 2d 347; *Lundy* v. *Isthmian Lines*, 423 F. 2d 913.

Only the Fifth Circuit in the instant case and in *Grigsby* v. *Coastal Marine Service*, 412 F. 2d 1011, and the Ninth in *Tim* v. *American President Lines*, 409 F. 2d 385, stood against the rule of *Mascuilli*.

SUPREME COURT OF THE UNITED STATES

No. 47.—October Term, 1970

Joseph Charles Usner, Petitioner, *v.* Luckenbach Overseas Corporation et al.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January 25, 1971]

Mr. Justice Harlan, dissenting.

Past decisions of this Court have expanded the doctrine of unseaworthiness almost to the point of absolute liability. I have often protested against this development. See, *e. g.*, the cases cited by the Court, *ante*, p. —, n. 6. But I must in good conscience regard the particular issue in this case as having been decided by *Crumady* v. *The J. H. Fisser*, 358 U. S. 423 (1959), even if prior decisions did not inexorably point to that result. As my Brother Douglas states, *Crumady* cannot justly be distinguished from the case before us. Much as I would welcome a thoroughgoing reexamination of the past course of developments in the unseaworthiness doctrine, I fear that the Court's action today can only result in compounding the current difficulties of the lower courts with this area of the law.